SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 547

NEW COLONIAL ICE COMPANY, INC., PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 27726

NEW COLONIAL ICE CO., INC., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:

For Petitioner: Alvin T. Sapinsley, Esq., (Withdrawn) Joseph Sterling, Esq.
For Respondent: J. D. Kiley, Esq., H. D. Thomas, Esq.

1927.

Apr. 29. Petition received and filed. Taxpayer notified.
" 30. Copy of petition served on General Counsel.
June 29. Answer filed by General Counsel.
July 2. Copy of answer served on taxpayer—General Calendar.

1928.

Nov. 14. Notice of withdrawal of Alvin T. Sapinsley as counsel for taxpayer filed.
" 14. Notice of appearance of Joseph Sterling as counsel for taxpayer filed.
" 14. Motion to transfer to the New York City circuit calendar filed by taxpayer. November 15, 1928, granted.

[fol. 2]

1930.

Jan. 18. Order placing on Reserve B entered.
Aug. 14. Order placing proceeding on New York, N. Y., circuit calendar entered.
Oct. 8. Motion for leave to file amended answer—amendment tendered—filed by General Counsel. October 11, 1930, granted.

1931.

Feb. 21. Hearing set March 30, 1931, at New York City.

Mar. 24. Application for subpœna of Louis Baron and R. G. Woelfel and A. Pellegrin filed by General Counsel.

" 24. Subpœna issued to Louis Baron, et al. (3).

Apr. 1. Hearing held before H. F. Seawell, Division 4. Stipulation of facts filed. Briefs due 60 days from date—ten days for replies.

" 11. Transcript of hearing of March 30 and April 1, 1931, filed.

May 26. Motion for extension to September 1, 1931, to file brief filed by General Counsel. May 29, 1931, granted to both parties.

" 30. Brief filed by taxpayer. August 20, 1931, copy served.

Aug. 20. Brief filed by General Counsel.

Nov. 24. Findings of fact and opinion rendered—Herbert F. Seawell, Division 4. Judgment will be entered under Rule 50.

Dec. 16. Notice of settlement filed by General Counsel.

[fol. 3]

Dec. 19. Hearing set January 6, 1932, under Rule 50.

1932.

Jan. 6. Hearing had before Mr. Trammell, Division 2, on settlement under Rule 50—not contested. Referred to Mr. Seawell for decision.

" 8. Decision entered H. F. Seawell, Division 4.

May 23. Petition for review by United States Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

June 1. Proof of service of petition for review, filed.

" 14. Præcipe filed with affidavit of service thereon.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed April 29, 1927

The above-named petitioner hereby petitions for a redetermination of the alleged deficiency set forth by the Com-

[fol. 4] missioner of Internal Revenue in his notice of deficiency IT:CA:2111-12-60D, dated March 1st, 1927, and as a basis of its proceeding alleges as follows:

First: The petitioner is a corporation organized under the laws of the State of New York, with its principal office at 152nd Street and Eighth Avenue, New York, New York.

Second: The notice of deficiency—a copy of which is attached hereto and marked "Exhibit A", was mailed to the petitioner on March 1st, 1927.

Third: The taxes in controversy are income taxes for the calendar years 1922 and 1923, and are for $5,681.13.

Fourth: The determination of taxes set forth in said notice of deficiency is based upon the following errors:

The Commissioner of Internal Revenue has erred in his interpretation in the application of Section 204 of the Revenue Act of 1921 covering prior year losses incurred from trading in and to be applied within the two succeeding years and in failing to treat the petitioner and the Colonial Ice Corporation as merged, so as to be considered as one entity and in failing to apply losses sustained by said Colonial Ice Corporation in 1921 against income of the New Colonial Ice Co., Inc., resulting from trading in 1922 and 1923.

The facts upon which the petitioner relies as to the basis of this proceeding are as follows:

(A) Colonial Ice Corporation, hereinafter referred to as "the old company", was incorporated under the laws of the [fol. 5] State of New York, on April 20th, 1920, with an authorized capital of $315,500, consisting of 3,000 shares of preferred stock, of the par value of $100 each and 3,100 shares of common stock of the par value of $5 each, later increased to $750,000 being 6,500 shares preferred of $100 par value and 20,000 shares common of $5 each.

(B) The corporation was promoted by one Edmond C. Turner, who had associated with him his wife, Florence C. Turner, and one Michael De Carlo. These persons instituted a stock-selling campaign among small ice and coal dealers in the City of New York. The stock was sold in units of one share of common and one share of preferred, the sale price per unit being $100.

(C) The corporation purchased a block in Manhattan, New York, bounded by Eighth Avenue, McCoombs Place, 151st Street and 152nd Street. On this block, there were substantial buildings, susceptible to alterations into an ice-plant. Extensive contracts were entered into for structural improvements and for the installation of refrigerating machinery in the building. The largest contract was with the De La Vergne Machine Company, whose contract was for $344,600. Other contracts aggregated $184,325.42. The contracts with the De La Vergne Machine Company and with the other creditors who installed equipment provided that the title to the property installed remained in the vendor until the purchase price was fully paid.

The installation of equipment proceeded to a point when, in about August, 1921, the plant was in condition to operate [fol. 6] at a capacity of 150 tons per day, which was approximately 40 per cent of the entire capacity contemplated. At that time, the Company owed creditors approximately $285,000 but had no funds in hand with which to make payment.

(D) The inability of the Company to meet its obligations resulted in the creditors and the stockholders losing confidence in Turner and his associates, in the formation of a Creditors' Committee, which acted through the De La Vergne Machine Company, and in the organization of several Stockholders' Committees.

(E) An investigation of the affairs of the Company was had. Among other things disclosed by this investigation was that there were certificates of common stock of the company outstanding in the name of said Turner and aggregating 9,426 shares of stock, for none of which did the Corporation seem to have received any consideration, nor for the issuance of which was there any valid authority. Of these shares, there were certificates for approximately 5,614 shares which nowhere appear to be recorded, either in the stub of the certificate book or the stock ledger. There also appeared to have been issued to Michael De Carlo certificates for a smaller quantity of common stock which had been improperly issued and which had been transferred by De Carlo to other persons.

(F) Because of the condition in which the corporate records were kept, there were no means of determining how

much such questionable stock had been set afloat nor who [fol. 7] held it. The creditors were in a position either to have a Receiver appointed of the Corporation or to remove their equipment under the terms of their conditional bills of sale. They were loathe, however, to take either of these courses, inasmuch as such action would mean wiping out the many legitimate stockholders, numbering over six hundred, who were people of very small means and whose investments, in many cases, represented their life savings.

(G) Because of this situation, Turner resigned as an officer and director of the Company—disassociating himself from any connection therewith. He reassigned to the corporation 9,426 shares which had been improperly issued to him and consented to the cancellation of these shares of stock. The company also procured surrender for cancellation of such other certificates of stock as were improperly issued and of which it had acquired knowledge through the investigation.

(H) New officers and directors were elected under the management of the creditors. The Company was operated but at a loss. Protracted negotiations commencing in August of 1921, and extending until April of 1922, were had between the creditors and the bona fide stockholders. In April of 1922, definite arrangements were consummated between the old company and the creditors whereby the creditors agreed to and with the stockholders to withhold action on moneys then due them and to complete their contracts, so that the old company could operate at its full capacity, on condition, however, that the management and conduct of the Company should be invested in them until such times as its obligations shall have been paid in full. [fol. 8] Upon these obligations being paid in full, the creditors were to relinquish their control and the stockholders were to be invested in their full proprietary rights. The creditors were to have no beneficial interest in the Company or its assets whatsoever, other than to insure the payment of the obligations due to them.

(I) The question then arose as to the legal machinery to be adopted in order to carry this purpose into effect. The names of the bona fide stockholders and their respective stockholdings, preferred and common, were fully as-

certained. The spurious stock, so far as it had been ascertained, had been recaptured and cancelled. All parties in interest were fearful, however, that there might be other spurious stock outstanding, of which they had no knowledge. In order, therefore, to avoid loss to the bona fide holders of stock, and in order to prevent the organization from becoming involved in possible legal entanglements or from harassing suits which might be instituted by owners of spurious certificates of stock, the following plan was devised:

(J) A new corporation was to be formed, to be called, "New Colonial Ice Co., Inc.". This corporation is hereinafter called "the new company". The old company was to assign to the new company all of its assets of every nature and description. The new company was to assume the obligations of the old company. The new company was to issue to the old company preferred and common stock—the amount of common and preferred to be issued of the same denominations and to be equal to the amount of outstanding valid common and preferred of the old company.

[fol. 9] (K) The old company was to transfer the common stock so issued to voting trustees, two of whom were to be nominated by the creditors and one by the stockholders—the voting trustees to hold the stock for the Company and to issue to the old company trust certificates for the amount of common stock so held by the trustees. Upon the stockholders of the old company surrendering their preferred stock and the accompanying share of common stock, the old company was to give to such stockholder shares of preferred stock of the new company for the amount so surrendered and an equivalent amount of voting trustees' certificate of common stock.

(L) The new company was to have a board of directors consisting of seven, of whom four were to be representatives of the creditors and three of the stockholders. The voting trust agreement and the agreement between the creditors and the old company provided that upon the creditors being paid in full, the voting trust was to come to an end, so that the stockholders of the Company would again, by this means, have management and control of the plant.

(M) The plan as devised was carried out. The old company transferred all assets to the new company, which assumed the obligations. Preferred stock and voting trustees' certificates for common stock were distributed among the legitimate stockholders of the new company, in the same proportion as they were entitled to hold preferred and common stock in the old company.

(N) At the time when this transaction was consummated, there outstanding 3,385 shares of preferred stock of the [fol. 10] old company. The valid amount of common stock so outstanding also consisted of 3,385 shares. The stockholders of the old company (with the exception of an inconsequential amount) surrendered the stock of the old company and received share for share of preferred stock of the new company for preferred in the old and voting trustees' certificates of common in the new company for common stock in the old.

(O) The old company continued to hold for the benefit of the comparatively few stockholders who had not affected a change, a like amount of stock in the new company.

(P) During the past five years, the affairs of the Company had been managed so prudently and successfully that the indebednesses of the Company have been fully paid. The voting trust was terminated on April 9th, 1927. The creditors have caused their representaives on the Board of Directors to resign, to the end and purpose that the creditors' control of the corporation has come to an end.

(Q) Notices have been sent out or shortly will be sent out permitting the stockholders to surrender their voting trust certificates and obtain common stock instead.

(R) It is respectfully called to the attention of this Board that for all intents and purposes, the new company and old company are identical. No cash or other consideration of any nature, shape or form was paid for the transfer. After the transfer, the assets and liabilities remained as they were before. The beneficial interests of stockholders remained exactly as before and precisely in [fol. 11] the same proportions. The change was in name only.

(S) The obvious and evident purpose of the transfer from one corporate entity to the other corporate entity was

to afford a convenient vehicle to enable the creditors to manage the corporation until their obligations were paid off, free from any apprehensiveness or fear that spurious stock might evidence itself and hamper and harass them in the control of the plant. The loss incurred while operating under the old name should in good morals be deducted from profits earned under the new name.

Wherefore the petitoner prays that this Board may hear the proceeding and disallow said assessment of $5,681.13.

Alvin T. Sapinsley, Counsel for Petitioner. Office and Post-office address: No. 342 Madison Avenue, Manhattan Borough, New York City.

Duly sworn to by Antonio Mastromonica. Jurat omitted in printing.

[fol. 12] EXHIBIT A TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:CA:2111-12-60D

Mar. 1, 1927.

New Colonial Ice Company, Incorporated, 152nd Street and Eighth Avenue, New York, New York.

SIRS: The determination of your income tax liability for the years 1922 and 1923, as set forth in office letter of Feb-
[fol. 13] ruary 2, 1927, discloses a deficiency in tax for both years amounting to $5,681.13 as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addresed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals

and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CA:2111-12-60D.

In the event that you acquiesce in a part of the deter- [fol. 14] mination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by C. R. Nash, Assistant to the Commissioner.

Inclosures: Statement, Form A, Form 882.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDED ANSWER—Filed Oct. 8, 1930

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for amended answer to the petition of the above-named taxpayer admits and denies as follows:

[fol. 15] First: Admits the allegations contained in the First paragraph of the petition.

Second: Admits the allegations contained in the Second paragraph of the petition.

Third: Denies the allegations contained in the Third paragraph of the petition, and alleges that the taxes in controversy are income taxes for the calendar year 1922, in the amount of $6,282.93 and for the calendar year 1923, in the amount of $828.07.

Fourth: Denies that the Commissioner erred in the determination of the said deficiency as alleged in the Fourth paragraph of the petition, and alleges that the Commissioner erred in determining the deficiency against this petitioner for the year 1922 by allowing as a deduction from the petitioner's net income a net loss of the Colonial Ice Company for the year 1922 in the amount of $11,738.90.

(A) Admits the allegations contained in paragraph (A) of the petition.

(B) to (S), inclusive. For lack of information denies the allegations contained in paragraphs (B) to (S), inclusive, of the petition.

Denies generally and specifically each and every allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified or denied.

For a further and affirmative defense the respondent alleges:

1. That the petitioner was incorporated under the laws of the State of New York on April 8, 1922.

[fol. 16] 2. That the books of the old corporation were closed on April 13, 1922.

3. That the income of the petitioner for the year 1922 was $50,263.43.

4. That the determination of the deficiency against the petitioner for the year 1922 is based upon the net income for said year in the amount of $38,824.43, which was arrived at by reducing the petitioner's net income by a net loss of the Colonial Ice Company from January 1 to April 13, 1922, in the amount of $11,738.90.

5. That no part of the loss of the Colonial Ice Company of $11,738.90 is deductible from the income for the year 1922 of this petitioner.

Wherefore, it is prayed that the contentions of this petitioner be denied and that a deficiency in tax be redetermined against the taxpayer for the year 1922 in the amount of $6,282.93 and for the year 1923 in the amount of $828.07.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: T. M. Mather, Special Attorney, Bureau of Internal Revenue.

[fol. 17] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION—Filed at Hearing April 1, 1931

The above-named petitioner and the respondent, by their respective counsel, do hereby agree upon the following statement of facts:

(A) Colonial Ice Corporation, (hereinafter referred to as the "old company"), was incorporated under the Laws of the State of New York, on April 20th, 1920. Its authorized capital was $750,000, consisting of 6,500 shares of preferred stock of $100.00 par value, and 20,000 shares of common stock, of $5.00 par value.

(B) The corporation was promoted by one, Edmon C. Turner, who had associated with him his wife, Florence C. Turner, and one Michael DeCarlo. These persons instituted a stock-selling campaign among small ice and coal dealers in the City of New York. The stock was sold in units of one share of common and one share of preferred, the sale price per unit being $100.00.

[fol. 18] (C) The corporation purchased a block in Manhattan, New York, bounded by Eighth Avenue, McCoombs Place, 151st Street and 152nd Street. On this block, there were substantial buildings, susceptible to alteration into an iceplant. Extensive contracts were entered into for structural improvements and for the installation of refrigerating machinery in the building. The largest contract was with the DeLaVergne Machine Company. The contracts with the DeLaVergne Machine Company and with the other creditors who installed equipment provided that the title to the property installed remained in the vendor until the purchase price was fully paid.

The installation of equipment proceeded to a point when, in about August, 1921, the plant was in condition to operate at approximately forty per cent of the entire capacity contemplated. At that time, the Company owed creditors approximately $285,000, and was not in a financial condition at that time to liquidate this indebtedness or to supply the additional equipment required to operate at a profit.

(D) The inability of the Company to meet its obligations resulted in the creditors forming a Creditors' Committee,

which acted through the DeLaVergne Machine Company, and in the organization of a Stockholders' Committee.

(E) The Creditors' Committee caused an investigation to be had of the affairs of the Company. It was discovered that the promoter had caused the issuance of a large number of shares, for which no consideration had been received [fol. 19] by the corporation, and that much of this stock was not even recorded in the records of the company.

(F) Because of this situation, Turner resigned as an officer and director of the company,—disassociating himself from any connection therewith. He reassigned to the corporation the shares of stock which had been improperly issued to him and consented to the cancellation of these shares of stock. The company also procured surrender for cancellation of such other certificates of stock as were improperly issued and of which it had acquired knowledge through the investigation.

After these shares had been returned to the corporation and cancelled, it was ascertained that 3,385 shares of preferred stock and the same number of shares of the common stock of the corporation had been legally issued and recorded.

(G) In August, 1921, at the instigation of the creditors of the company, a stockholders' meeting was held, at which time new officers and directors of the creditors' choosing were elected. Protracted negotiations, commencing in August, 1921, and extending to April, 1922, were had between the creditors and the bona fide stockholders. These negotiations resulted in the Colonial Ice Corporation entering into an agreement with the DeLaVergne Machine Company, acting on behalf of itself and other creditors, (copy of which agreement is attached hereto as "Exhibit A" and made a part hereof).

(H) Pursuant to the agreement dated April 13, 1922, the petitioner, New Colonial Ice Company, Inc., was incorpo- [fol. 20] rated under the Laws of the State of New York, with a capitalization of $700,000, consisting of 6,000 shares of preferred stock of the par value of $100.00 per share, and 20,000 shares of common stock, of the par value of $5.00 per share, (as is evidenced by the attached Certificate of Incorporation, which is made a part hereof as "Exhibit B").

As of the date of the incorporation of the new company, the assets and liabilities of the old company were, and became the assets and liabilities of the new company.

(I) At the time when this transaction was consummated, there were outstanding 3,385 shares of preferred stock and a like amount of common stock of the old company. Accordingly, the issued stock of the new company was, as follows: 3,385 shares of preferred stock and 3,385 shares of common stock.

The preferred stock was issued to the old company, which corporation thereupon re-assigned and re-delivered said certificate for 3,385 shares of preferred stock to the new company, with directions that it should cancel said certificate and issue and deliver certificates for such preferred stock to such persons, firms or corporations as the old company might direct. The 3,385 shares of common stock of the new company were issued to Louis Baron, Fred Nolte, and Robert D. Eggleston, as Voting Trustees, pursuant to said agreement.

Said Voting Trustees thereupon issued voting trustees' certificates for 3,385 shares to the old company, which company thereupon endorsed and re-delivered said certificate [fol. 21] of 3,385 shares to the said Voting Trustees, with directions that they should cancel said certificate and issue voting trustees' certificates to such persons, firms or corporations as the old company might thereafter direct.

That thereafter, the stockholders of the old company, with the exception of stockholders owning 247 shares of each class of stock, surrendered their stock to the old company and received from the new company, on direction from the old company share for share of preferred stock of the new company for preferred stock in the old company, and received from said voting trustees, voting trustees' certificates of common stock in the new company, share per share, for the common stock so surrendered, and the old company immediately retired and cancelled the preferred and common stock surrendered.

(J) The new company held 247 shares of preferred stock and the Trustees held 247 shares of the voting trustees' certificates in the new company available to those stockholders of the old company who had not as yet turned in their shares in the old company for surrender and exchange, pursuant to the terms of the agreement referred

to in paragraphs "G" and "H" herein. Up to and including December 31, 1922, these shares of preferred stock and voting trust certificates were still held unexchanged.

Subject to objection on the part of the respondent as to its relevancy and materiality, it is further stipulated, that in years subsequent to 1922 the stockholders holding 247 shares of preferred stock, and a like amount of common stock in the old company ultimately exchanged this stock for a like amount of preferred stock and voting trust [fol. 22] certificates in the new company.

(K) The old company's corporate existence continued throughout 1922 and 1923. It transacted no business and had no assets.

(L) The agreement of April 13, 1922, continued until April 9th, 1927, at which date the voting trust terminated and the common stock of the new company was exchanged in place of voting trust certificates theretofore held by stockholders. With the termination of the voting trust, the creditors relinquished such management and control as they might theretofore have had under the aforementioned agreement.

(M) The assets and liabilities of the old company became the assets and liabilities of the new company as at the date of incorporation of the latter.

(N) It is further stipulated and agreed that the statutory net losses of the old company for the calendar year 1921 was, the sum of $36,093.19.

(O) It is further stipulated and agreed that for the period commencing January 1, 1922, and ending April 13, 1922, the old company sustained a statutory net loss in the sum of $10,338.90.

(P) It is further stipulated and agreed, that for the period commencing April 14, 1922, up to and including December 31, 1922, the net income of the new company was, the sum of $48,763.43.

[fol. 23] (Q) It is further stipulated and agreed, that the net income of the new company for the calendar year 1923 was in the amount of $56,242.55.

Dated, New York, March 30, 1931.

Joseph Sterling, Counsel for Petitioner. C. M. Charest, Counsel for Respondent.

EXHIBIT "A" TO STIPULATION

Agreement made this 13th day of April, 1922, by and between Colonial Ice Corporation, a New York Corporation, having a principal place of business at Eighth Avenue and 152nd Street, Borough of Manhattan, City of New York (hereinafter called the Ice Corporation) and De La Vergne Machine Company, a New York Corporation, having a principal place of business at the Foot of East 138th Street, Borough of Bronx, City of New York, acting on behalf of itself and of Julius H. Stone, Inc., General Electric Company, B. Franklin Hart, Jr. & Co., Gifford Wood Company, Edward B. Stott & Co., Goulds Manufacturing Co., National Ammonia Co., Robert A. Keasby Company, Joseph Lagana, Thomas Whalen and Joseph A. Cerra, creditors of the Ice Corporation, hereinafter called De La Vergne Company.

Witnesseth:

Whereas, the Ice Corporation is indebted to the De La Vergne Company and other creditors in the sum of about [fol. 24] $285,000 for machinery, plant and equipment furnished and monies advanced to or for the Ice Corporation and is without funds with which to pay said indebtedness; and

Whereas in order to bring the Plant of the Ice Corporation to full capacity so that it may operate efficiently, economically and with profit, it is necessary that the De La Vergne Company complete said plant as originally planned and furnish additional machinery and equipment, for payment of which the Ice Corporation is also without funds; and

Whereas, a scheme of reorganization has been proposed under which the creditors will agree to complete said plant and grant to the Ice Corporation reasonable time within which to pay its present indebtedness and also the cost of said additional plant; and

Whereas, the Ice Corporation is desirous of accepting said scheme of reorganization,

Now, therefore, in consideration of the sum of One Dollar each to the other in hand paid, receipt whereof is hereby acknowledged and of other good and valuable considerations and of the mutual covenants herein contained, it is hereby agreed as follows:

First. The Ice Corporation agrees that it will cause to be organized a corporation under the laws of the State of

New York to be called "New Colonial Ice Company, Inc." with a capitalization as follows:

[fol. 25] 6,000 shares of cumulative 6 per cent non voting preferred stock of $100 par value per share and 20,000 shares of common stock at $5.00 par value per share, the Charter and By-laws of said Corporation to provide for a Board of Directors of seven members, and that the date upon which said preferred stock shall commence to accumulate its dividends shall be from the date of issue.

Second. The Ice Corporation agrees to make and enter into an agreement with said "New Colonial Ice Company, Inc.," as follows: It will sell, assign, transfer and convey to said New Colonial Ice Company, Inc., all of its property of whatsoever kind and nature, including its real estate, its Ice Plant, and all the appurtenances thereto, its cash in bank, bills and accounts receivable, its goodwill and going business, and in payment therefor will accept the undertaking of said New Colonial Ice Company, Inc., to assume and pay all of its indebtedness, and as further consideration for said transfer it will take and accept about 3,400 shares of the preferred stock and voting trust certificates for about 3,400 shares of the common stock of said New Colonial Ice Company, Inc.

Third. Upon condition that the provisions of this agreement are faithfully performed and carried out, the De La Vergne Company, on behalf of itself and of the other creditors above named, agrees that it will promptly proceed with the completion of the Plant of the Ice Corporation to its full capacity at an additional cost of approximately $132,000, the De La Vergne part thereof to be at contract [fol. 26] price, and will furnish or cause to be furnished the machinery, equipment, etc., necessary for that purpose in order that said plant may be in condition to secure the benefit of the ice trade for the coming season, and upon the same condition the De La Vergne Company agrees on behalf of itself and said creditors that it will extend the time for payment of all the present indebtedness of the Ice Corporation and of the additional indebtedness for the completion of the plant by itself and certain of the creditors for three (3) years from the 1st of March, 1922, and, if it shall be necessary in order for said New Colonial Ice Company, Inc., to pay its said indebtedness, for such fur-

ther period as may be reasonably required, not however in any event to exceed five years from the 1st day of March, 1922, provided, however,

(a) That paid in subscriptions for the stock of said New Colonial Ice Company, Inc., shall be received by it to the amount of $100,000 before this agreement shall become binding upon said De La Vergne Company, unless De La Vergne Company shall hereafter waive this provision.

(b) That at a special meeting of the stockholders of the Ice Corporation to be called, there shall be a vote of not less than two thirds of all the stockholders in favor of carrying through said scheme of reorganization.

(c) That all profits from the operation of said plant and all receipts from the sale of stock or other property [fol. 27] of the corporation or otherwise shall be used for payment of the corporation's indebtedness as rapidly as said profits or receipts may be received having due regard for leaving in the treasury of said company funds reasonably sufficient for the carrying on of its then business.

(d) That control of the management of said Company through a voting trust agreement of all of its common stock shall be vested in De La Vergne Company until the entire indebtedness of the Company shall have been paid or sufficiently paid so as in the sole judgment of the De La Vergne Machine Company to warrant it in giving up said control, it being understood and agreed that the stockholders shall be entitled to be represented on the Board of Directors of said Company by three out of the seven members of the Board, who shall be designated by the preferred stockholders.

(e) That as part of the consideration to De La Vergne Machine Company to go forward with the completion of the plant and to extend the time of payment of said indebtedness, the New Colonial Ice Co., Inc., shall issue and deliver to De La Vergne Machine Co. the entire amount of its common stock in order that, and De La Vergne Machine Co. so agrees, said common stock may then be placed in a voting trust to terminate after five years or at such earlier date as

the said indebtedness may be paid and in order further that [fol. 28] said common stock, or voting trust certificates therefor, may be returned into the treasury of the Company as full paid stock.

(f) That interest shall accrue and be paid upon said indebtedness at the rate of 6% per annum from March 1st, 1922.

Fourth: De La Vergne Machine Company agrees that so long as it is in control of the management of said Company there shall be no salaries paid to officers of the Company, except to the Manager thereof; that no commissions shall be paid for the sale of the stock of the Company; that no bonus stock shall be issued except along with the sale of the preferred stock; that no common stock shall be sold by the Company, except as herein provided, except with an equivalent number of shares of preferred stock unless with its consent and with the consent of a majority vote of the preferred stockholders of said Company at a special meeting called for that purpose, a provision to this effect to be endorsed upon the common stock certificate, and further covenants and agrees that it will terminate or cause to be terminated the voting trust agreement and will turn over the management of the Company to the stockholders without conditions of any kind as soon as payment of all the Company's indebtedness shall have been made, and, if the preferred stockholders shall at any time devise a plan whereby sufficient monies may be raised to pay in full the indebtedness then due to the creditors, the voting trustees and directors will take such formal actions and give such assents as [fol. 29] may be necessary and proper to effectuate such plan, under advice of counsel and proper safe-guards to ensure the position of the creditors until such time as the indebtedness may be paid.

Fifth: It is understood and agreed that all contracts and books of account showing payments to creditors shall be submitted to Stockholders Committee for verification of indebtedness before this contract shall become binding or effective.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their duly authorized officers

and their corporate seals to be affixed the day and year above written.

Colonial Ice Corporation, by L. Doelling, Vice-Pres.
De La Vergne Machine Co., by Carroll S. Smith, Pres.

Witnessed by Robert D. Eggleston.

[fol. 30] PETITIONER'S EXHIBIT No. 1

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and refer to IT:CA-2111-12.

Feb. 2, 1927.

New Colonial Ice Company, Incorporated, 152nd Street and Eighth Avenue, New York, New York.

SIRS: An audit of your income tax returns for the years 1922 and 1923 discloses a deficiency in tax for both years amounting to $5,681,89 as shown in the attached statement.

You are granted 10 days from the date of this letter within which to present a protest against the deficiency proposed herein. The protest and any additional statements of facts must be executed in triplicate, under oath, and contain the following information:

(a) The name and address of the taxpayer (in the case of an individual the residence, and in the case of a corporation the principal office or place of business); (b) in the case of a corporation the name of the State of incorporation; (c) the designation by date and symbol of the letter advising of the proposed deficiency with respect to which the protest is made; (d) the designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings to which the taxpayer takes exception; (f) a summary statement of the [fol. 31] grounds upon which the taxpayer relies in connection with each exception; and (g) in case the taxpayer desires a hearing, a statement to that effect.

If a protest is filed, any additional evidence or briefs of argument submitetd will be given careful consideration, and if the Commissioner finally determines that there is a deficiency, you will be advised thereof by registered mail in accordance with the provisions of Section 274 of the Revenue Act of 1926. Should you not agree to the deficiency as finally determined by the Commissioner, you will be allowed 60 days from the date of mailing of the registered letter (not counting Sunday as the sixtieth day) in which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

If you acquiesce in the proposed deficiency as shown in this letter and the accompanying statement, yau are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CA-2111-12. In the event that you acquiesce in a part of such deficiency, the waiver should be executed with respect to the items to which you agree.

Respectfully, C. R. Nash, Assistant to the Commissioner; by —— ——, Head of Division.

Inclosures: Statement, Form A, Form 882.

TX-3.

[fol. 32] IT:CA:2111-12-60D

Statement

In re New Colonial Ice Company, Incorporated, 152nd Street and Eighth Avenue, New York, New York

Year	Deficiency in tax
1922	$4,853.06
1923	828.07
Total	$5,681.13

Net Income, 1922

Net Income reported	None
Add:	
1. Amount deducted to cover portion of loss for 1921	$34,051.93
2. Loss of money applicable to 1920 and 1921	4,772.60
Net income adjusted	$38,824.53

Explanation of Adjustment to Net Income

1. The loss for 1921 has been disallowed inasmuch as the evidence submitted in your protest of February 14, 1927, is not sufficient to determine whether you are entitled to the benefit Section 204 of the Revenue Act of 1921.

2. Loss of $4,772.60 taken as a deduction disallowed inasmuch as Schedule F of your return indicates that this is [fol. 33] applicable to 1921 and 1922. The explanation of the deduction in your brief of February 14, 1927, is not sufficient to allow it.

Computation of Tax

Tax at 12½%	$4,853.06
Previously assessed	none
Additional tax	$4,853.06

1923

Net income reported	$49,617.96
Add:	
1. Balance of loss for 1921	6,624.59
Net income adjusted	$56,242.55

Explanation of adjustment to net income:

1. See Explanation No. 1 for 1922.

Computation of Tax

Tax at 12½%	$7,030.32
Previously assessed	6,202.25
Additional tax	$828.07

Payment of the deficiency in tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

(Here follows Respondent's Exhibit A, side folios 34-37)

RESPONDENT'S EXHIBIT "A"

34

Amt 8-5-4p.

Form 1120
U. S. Internal Revenue
(Auditor's Stamp)

CORPORATION INCOME TAX RETURN

For Calendar Year 1922

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1923

Page 1 of Return
(DO NOT WRITE IN THESE SPACES)
SERIAL NUMBER 857266
FILE CODE
FIRST PAYMENT $
Examined by
(Cashier's Stamp)
Cash Check M.O. Cert. of Ind.

PRINT PLAINLY CORPORATION'S NAME AND BUSINESS ADDRESS

New Colonial Ice Co., Inc.
152nd St. & 8th Ave.
(Street and Number)
New York City, N. Y.
(Post office and State)

Date of Incorporation April 8, 1922.

Under the Laws of What State or Country New York State

NATURE OF BUSINESS Manufacture of Ice.

IS THIS A CONSOLIDATED RETURN? No.

GROSS INCOME				
1. Gross Sales from Trading or Manufacturing (less returns and allowances)			234,190.57	
2. Less Cost of Goods Sold				
(a) Inventory at beginning of year		24.30		
(b) Merchandise bought for sale		- -		
(c) Cost of manufacturing or otherwise producing goods (from Schedule A)		103,599.53		
(d) Total of lines (a), (b), and (c)		103,623.83		
(e) Less inventory at end of year		513.67	103,110.16	
3. Gross Profit from Trading or Manufacturing (line 1 less 2f)			131,080.41	
4. Gross Profit from Operations Other Than Trading or Manufacturing				
(a)				
(b)				
(c)				
5. Interest on Bank Deposits, Notes, Mortgages and Corporation Bonds			388.95	
6. Rents			- -	
7. Royalties			- -	
Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets (from Schedule B)			- -	
Dividends on Stock of Domestic Corporations			- -	
10. Other Income (state fully the kinds of income received or accrued from sources outside of business operations and from sources outside the United States)				
a. Rental of billboard space			240.00	
b. Discount on purchases			33.09	
11. Total Income (items 3 to 10)				131,752.45
DEDUCTIONS				
12. Compensation of Officers (from Schedule D)			N O N E	
13. Rent on Business Property			- -	
14. Repairs (from Schedule E)			- -	
15. Interest			4,296.59	
16. Taxes (from Schedule F)			25,875.79	
17. Losses by Fire, Storms, etc. (from Schedule F)			7,318.00	
18. Bad Debts (from Schedule G)			4,586.00	
19. Dividends (deductible under Section 234(a), 6 of the Revenue Act of 1921) (from Schedule H)			- -	
20. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (from Schedule I)			25,116.50	
Amortization of War Facilities			- -	
Depletion of Mines, Oil and Gas Wells, Timber, etc.			- -	
21. Other Deductions Not Reported Above. (Explain below, or on separate sheet)				
Counterfeit $5.00 bill	5.00	Auditing Exp.	250.00	
Rental Cap.Stock Tax	5.00	Miscellaneous	1,315.83	
Heating Expenses	589.83	Insurance	1,838.01	
Salary of Manager	6,000.00	Legal Exp.	1,683.38	
Office Supplies & Exp.	878.26	Suits & Claims settled	3,971.00	
Office Salaries	3,381.50	Corrigan, Mc[illegible] & Equity un-		
Printing & Stationery	324.83	Adjustment [illegible] payable	1,000.00	
Postage/stamps	170.48		359.69	
				30,494.64
22. Total Deductions (items 12 to 21)				97,687.91
23. Net Income (item 11 minus item 22)				34,064.54
Loss as per return for the calendar year [illegible] Colonial Ice Corporation			NET LOSS	10,875.75
24. Net Income (item 23 above)		N O N E		N O NE
25. Less Credit of $2,000 (for a domestic corporation having a net income of less than $25,000)				
26. Balance (item 24 minus item 25)				
27. Less Income Tax Paid at Source (for a nonresident foreign corporation)				
28. Income and Profits Taxes Paid to a Foreign Country or to a Possession of the United States				
29. Balance of Tax (item 26 minus items 27 and 28)				N O NE
29. Income Tax (12½% of item 24)				N O NE
30. If the Net Income (a Domestic Corporation is Less Than $25,000, Enter the Amount in Excess of $2,000)				
31. Total Tax (item 29 plus item 30)				N O NE

An amended return must be marked "Amended" at top of return

Checks and drafts will be accepted only if payable at par

U. S. BOARD OF TAX APPEALS
DOCKET NO. 2220
PETITIONER'S EXHIBIT A
RESPONDENT'S

FA

A-1

Page 3 of Return. **SCHEDULE A.—COST OF MANUFACTURING OR PRODUCING GOODS.** (See Instruction 7.)

Items	Amount	Items	Amount (Enter on Item 2 (c).)
Labor	$46,852 63		$
Electric Power	46,853 87		
Water	4,644 64		
Ammonia(Actual Chgos.against reserve 6617)	3,187 40		
Lubrication	571 24		
Supplies	1,509 75		
	103,599 53		

SCHEDULE B.—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 8.)

1. Kind	2. Date Acquired	3. Amount Received	4. Depreciation	5. Cost	6. Value March 1, 1913	7. Subsequent Improvements	8. Net Profit (Enter on Item 6.)
		$	$	$	$	$	$

Remarks

SCHEDULE C. COMPENSATION OF OFFICERS. (See Instruction 12.)

Name	2. Official Title	3. Time Devoted to Business	Shares of stock owned 4. Common	5. Preferred	6. Amount of Compensation (Enter on Item 13.)
Willie B. Kirkpatrick	President		50	50	$ NONE
Rocco Cea	Vice-President		104	104	NONE
Louis Baron	Secty.& Treas.		-	-	NONE

SCHEDULE D.—COST OF REPAIRS. (See Instruction 14.)

1. Items	2. Amount (Enter on Item 14.)
Misc. material and supplies	$ 2,551 90
" " " "	
Labor	1,744 69
	4,296 59

SCHEDULE E.—TAXES PAID. (See Instruction 16.)

1. Items	2. Amount (Enter on Item 17.)
N. Y. State Franchise	$ 365 00
Real Estate	6,765 00
Federal Capital Stock	188 00
	7,318 00

SCHEDULE F.—EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 17.)

1. Kind of Property	2. Date Acquired	3. Cost or Value March 1, 1913	4. Subsequent Improvements	5. Depreciation Previous to Taken	6. Insurance	7. Salvage Value	8. Net Loss (Enter on Item 17.)
Cash (Unaccounted for)	1920&1921	$ 4,472 60	- -	- -	- -	- -	$ 4,472 60
"(Portion of payroll stolen)	1922	113 40	- -	- -	- -	- -	113 40
							4,586 00

SCHEDULE G.—BAD DEBTS. (See Instruction 18.)

1. Year	2. Balance Sheet	3. Bad Debts
1917		
1918		
1919		
1920		
1921		

SCHEDULE H.—DIVIDENDS DEDUCTIBLE. (See Instruction 19.)

1. Name of Corporation	Amount of Dividends 2. Preferred	3. Common

SCHEDULE I. EXPLANATION OF DEDUCTION FOR DEPRECIATION. (See Instruction 20.)

1. Kind of Property (If building, state material of which constructed)	2. Date Acquired	3. Life When Acquired	4. Probable Life After Acquirement	5. Cost or Value March 1, 1913.	Amount of Depreciation Charged Off This year	Previous	6. Total to Date
Buildings - brick	1920	--	33 yrs	$ 56,020 28	$ 1,540 90	(5 mths.of 1921 only) $ 1,834 61	
Refrigerating machinery & Electric Equipt.	--	New	20 "	471,878 41	20,051 05	6,456 87	
Office furniture and fixtures	--	New	7 "	3,561 44	524 55	213 01	
Tools not depreciated	--	New	--	200 00	- -	- -	
				531,660 11	25,116 50	8,504 29	

Attach a separate sheet if any of the above schedules do not provide sufficient space.

D A 2

2

Page 3 of Return. SCHEDULE 2. BALANCE SHEETS. (See Instruction V.)

Balance sheet of the Colonial Ice Corp. as of 12/31/21

Items													
ASSETS.													
1 Cash					$	3,289	20				$	7,760	03
2 Notes receivable													
3 Accounts receivable	$							$	3,126	47			
Less reserve for bad debts									-	-		3,126	47
4 Inventories:													
Raw materials	$							$					
Work in process													
Finished goods - Ice on Hand			24	30					513	67			
Supplies													
						24	30					513	67
5 Investments (describe fully):													
	$							$					
6 Loans (describe fully):													
	$							$					
7 Deferred charges:													
Prepaid insurance	$	1,197	25					$	1,234	25			
Prepaid taxes		86	50						415	62			
						1,293	75					1,649	87
8 Capital assets:													
Land						145,111	80					145,111	80
Buildings	$	148,829	40					$	156,020	26			
Machinery and equipment		338,910	77						471,878	41			
Horses and mules		3,490	19						3,561	44			
Automobile Equity		1,500	00									-	-
Tools		42	12						200	00			
		492,772	48		$			$	631,660	11			
Less reserve for depreciation and depletion		8,504	29			484,268	19		33,620	79		598,039	32
9 Patents													
10 Good will												150,000	00
11 Other assets (describe fully):													
Mortgage Receivable	$	20,950	00					$	7,950	00			
Subscribers to Capital Stock		67,290	60						61,763	00			
Pfd.Capital Stock issued Consideration not Ascertained		4,800	00						600	00			
Organization Expenses		126,177	58			219,218	18					80,313	00
12 Total Assets					$	853,195	42				$	986,514	16
LIABILITIES.													
13 Loans payable					$	3,916	01				$	5,246	62
14 Accounts payable						207,871	05					333,835	41
15 Accrued expenses: Franchise Tax			60	44									
Interest accrued			127	77					341	17			
Interest accrued on Mortgages			185	96					193	60			
" " on Indebtedness		4,262	50						3,918	75			
" " on Ice Contract Deposits						1,859	88		3,261	17		8,177	19
Insurance		153	81						354	05			
16 Other liabilities:													
Mortgages Payable	$	175,950	00					$	160,450	00			
Preferred Capital Stock Subscribed for		81,000	00						70,200	00			
Deposits on Account of Ice Contracts		500	00						4,350	00			
Reserve for Ammonia						257,450	00		613	50		235,613	50
17 Capital stock:													
Preferred stock issued in full	$	338,500	00					$	364,800	00			
Common stock issued in full 4435gh		22,175	00			360,675	00		18,240	00	36 08	383,040	00
18 Surplus	$	41,570	52		$	94,77'	44	$	20,601	38			
19 Undivided profits						41,570	52					20,601	38
20 Total Liabilities					$	853,195	42				$	986,514	16

Remarks: Balance Sheet of the Colonial Ice Corp. at Dec.31,1922 shows the following items:

Preferred Capital Stock of New Colonial Co.	24,700.	Pfd.Cap.St.outstanding	24,700.
Common	1,235.	Com.	1,500.
TOTAL	25,935.	Total still outstanding	26,200.
		Com.issued in excess of Pfd. - to be cancelled	265.
		TOTAL	25,935.

A 3

Page 4 of Return.

37

SCHEDULE L—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS.

1. Net income from P. page 1 of the return			34,051	93		
2. Not taxable in one						
(a) Income not subject to tax of the United States or its possessions						
(b) Income not subject to taxation of States, Territories, and political subdivisions thereof						
(c) Interest on U. S. Liberty Bonds issued under Federal Farm Loan Act						
(d) Dividends under the partial exclusion provisions of the Revenue Act of 1921						
(e) Proceeds of life insurance policies paid upon the death of the insured						
(f) Other items of this character (to be detailed)						
(1)						
(2)						
(3)						
3. Charges against reserves for bad debts (if from P. page 1 of return, leave as blank)						
4. Charges against reserves for contingencies, etc. (to be detailed)						
(a) Ammonia			3,167	40		
(b)						
(c)						
5. Total (Lines 1 to 4)			37,219	33		
6. Total (Line 19)			16,617	95		
7. Net income (Line 5 less Line 6)			20,601	38		
8. Deficit at beginning of year (Line 19)						
9. Total (Lines 7 and 8)			20,601	38		
10. Dividends paid during the taxable period (state whether paid in cash or property)						
(a) Date paid	Character					
(b) Date paid	Character					
(c) Date paid	Character					
(d) Date paid	Character					
(e) Other deductions (itemize)						
11. Total (Lines 10)						
12. Surplus and undivided profits at end of year (Line 9 less Line 11)			20,601	38		

1. Net income from P. page 1 of the return			34,051	93		
2. Not taxable in one						
(a) Income not subject to tax of the United States or its possessions						
(b) Income not subject to taxation of States, Territories, and political subdivisions thereof						
(c) Interest on U. S. Liberty Bonds issued under Federal Farm Loan Act						
(d) Dividends under the partial exclusion provisions of the Revenue Act of 1921						
(e) Proceeds of life insurance policies paid upon the death of the insured						
(f) Other items of this character (to be detailed)						
(1)						
(2)						
(3)						
3. Charges against reserves for bad debts (if from P. page 1 of return, leave as blank)						
4. Charges against reserves for contingencies, etc. (to be detailed)						
(a) Ammonia			3,167	40		
(b)						
(c)						
5. Total (Lines 1 to 4)			37,219	33		
6. Total (Line 19)			16,617	95		
7. Net income (Line 5 less Line 6)			20,601	38		
8. Deficit at beginning of year (Line 19)						
9. Total (Lines 7 and 8)			20,601	38		
10. Dividends paid during the taxable period (state whether paid in cash or property)						
(a) Date paid	Character					
(b) Date paid	Character					
(c) Date paid	Character					
(d) Date paid	Character					
(e) Other deductions (itemize)						
11. Total (Lines 10)						
12. Surplus and undivided profits at end of year (Line 9 less Line 11)			20,601	38		

12. Unallowable deductions.
(a) Donations, gratuities and contributions
(b) Income and profits taxes paid to the United States, its possessions, or foreign countries
(c) Special improvement taxes tending to increase the value of the property assessed
(d) Furniture and fixtures, affiliates, or betterments treated as expenditures on the books
(e) Replacements and renewals
(f) Insurance premiums paid on the life of officers or employees where the corporation is direct beneficiary
(g) Interest on indebtedness incurred or continued to purchase or carry obligations or securities of the United States the interest upon which is wholly exempt from taxation, except interest incurred to purchase or carry Liberty 4½% Bonds originally subscribed for by the corporation
(h) Additions to reserves for bad debts which are not in total as shown in P. page 1 of return
(i) Additions to banking and financial reserves (caution for bad debts and other contingencies to be detailed)
(1) Reserve for Ammonia — 3,052 06
(2)
(3)
(j) Other unallowable deductions (itemize)
(1) Organization Exp.written off — 417 10
(2) Goodwill — 11,833 33
(3) Common Stock Bonus — 1,315 00
13. Total (Line 12) — 16,617 95

REMARKS FOR OUR USE
Deficit of Colonial Ice Corp.became part of goodwill of New Colonial Co. which included claim,reserve for which was made on return of Colonial Corp.for 1921 - amount 900 00
and a shortage of cash ascertained in 1922- 500 00
and a loss in 1922 to date of re-organization 10,338 90

RECEIVED
MAR 15 1923
INTERNAL REVENUE

QUESTIONS.

KIND OF BUSINESS.

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

A.—Agriculture and related industries, including fishing, logging, ore harvesting, etc., and also the leasing of such property. State the product or products. B.—Mining and quarrying, including gas and oil wells, and also the leasing of such property. State the product or products. C.—Manufacturing. State the product and also the material if not implied by the name of the product. D.—Construction—excavations, buildings, bridges, railroads, ships, etc.; also equipping and installing same with systems, devices, or machinery, without their manufacture. State nature of structures built, material used, or kind of installations. E1.—Transportation (all water, local, etc. State the kind and special product transported, if any. E2. Public utilities (gas (natural, coal or water); electric light or power (hydro or steam generated); heating (steam or hot water); telephone; waterworks or power). F3. Storage without trading as profit (grain elevators, warehouses, etc.). State product stored. F4. Leasing (except utilities). State kind of property. F. Trading in goods bought and not produced by the trading concern. State manner of trade, whether wholesale, retail, etc. G. Sales and product handled. Sales with storage with profit primarily from same. H.—Service—domestic, including hotels, restaurants, etc.; amusements; other professional, personal, or technical service. State the service. H. Finance, including banking, real estate, insurance. I.—Concerns not falling in above classes (a) because of combining several of them with no predominant business, or (b) for other reasons.

2. Concerns whose business involves activity falling in two or more of the above general classes, where the same product is concerned, should report business as identified with but one of the above general classes; for example, concerns in A or B which also transport and market their own product exclusively or mainly, should still be identified with class A or B; concerns in C (manufacturing) which own or control their source of material supply in A or B and which also transport, sell, or install their own product exclusively or mainly, should be identified with manufacturing; concerns in D may control or own source of supply of materials used exclusively or mainly in their construction work; concerns in E1 or E2 may own or control the source of their material or power; concerns in F may transport or store their own merchandise, but its production would identify them with A, B, or C.

3. Answer:
(a) General class (use key letter designation) C
(b) Main income-producing business (business given to satisfy the information called for under each key letter, also whether as time or principal, or agent on commission; state if inactive or in liquidation)
Manufacture of Ice
Principal

AFFILIATIONS WITH OTHER CORPORATIONS.
(TO BE ANSWERED BY EVERY CORPORATION.)

4. Does the corporation own directly or control through stock ownership affiliated interests or by common ownership or majority interest control stock of another corporation or of other corporations?

5. Is over 70 per cent of your outstanding voting capital stock owned by another corporation?

6. Is over 70 per cent of your outstanding voting capital stock owned by two or more corporations that are affiliated?

7. Is over 70 per cent of your outstanding voting capital stock as well as over 70 per cent of the outstanding voting capital stock of another corporation or of other corporations owned or controlled by the same individuals, partnership or by the same individuals or partnership?

8. If the answer to questions 4, 5, and 6, or to any of them, is "yes," answer the following:
(a) Did the corporation file Affiliated Corporations Questionnaire, Form 819, for 1917 or subsequent taxable years? If the answer to this question is "yes," a questionnaire is not required, except under the circumstances described in question (b). If the answer to this question is "no," and the answer to questions 4, 5, and 6, or to any of them, is "yes," procure from the Collector of Internal Revenue for your district Form 819, which should be filled in and filed as a part of this return. If the answer to this question is "yes," question (b) need not be answered.

(b) Did substantially the same controlling interest, as are set out in the questionnaire filed for 1921 or prior years, obtain during the entire calendar year ended in 1922?
If the answer to this question is "no," a statement, setting forth the particulars in which the situation has changed, should be attached to and made a part of this return. If there have been substantial changes in stockholdings, a complete schedule of such changes should be submitted in the form prescribed in Tables 3 and 6 of the questionnaire. If there are companies other than those covered by the questionnaire for 1921 or prior years which, applying the tests contained in questions 4, 5, or 6, may have come into the affiliated group since 1921, a questionnaire, Form 819, is required for the entire group for the taxable period.

PREDECESSOR BUSINESS.

9. Did the corporation file a return under the same name for the preceding taxable period? No. If not, was the corporation in any way an outgrowth, result, continuation, or reincarnation of a business or businesses in existence during this or the preceding taxable period? Yes. If answer is "yes," give name and address of each predecessor business.

Colonial Ice Corporation
152nd St. & 8th Ave., N. Y. City

BASIS OF RETURN.

9. Is the return made on the basis of actual receipts and disbursements? No
If not, describe fully what other basis or method was used in computing net income.
Accrual basis

AMORTIZATION.

10. Has amortization been claimed? No. If the answer to this question is "yes," state for what year or years and the amount for each year.

LIST OF ATTACHED SCHEDULES.

11. Enter below a list of all schedules accompanying the return, giving for each a brief title and the schedule number.

*See copy of our letter to Mr. E.M. Chatterton of Feb. 14, 1923 and his of Feb. 28, 1923 hereto attached.

AFFIDAVIT.

We the undersigned, president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable period stated, pursuant to the Revenue Act of 1921 and the Regulations issued under authority thereof.

Sworn to and subscribed before me this 15 day of March, 1923.

SEAL.

H. R. Ford
(Collector's deputy whose name is typed)

W. Humphreys, President.
Louis Baron, Treasurer.

New York County Register's No. 4424,
Certificate filed in Bronx County No. 13,
Bronx County Register's No. 207,
Commission Expires March 30, 1924.

A-4

4

[fol. 38] Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:E:RR CFS.

February 28, 1923.

Mr. Louis Baron, Secretary and Treasurer, New Colonial Ice Company, Inc., Foot of East 138th Street, New York, New York.

SIR: Receipt is acknowledged of your letter of February 14, 1923, in further reference to the New Colonial Ice Company, Inc., Eighth Avenue and 152nd Street, New York, New York, filing one return for the full calendar year 1922.

It appears that the *New Colonial Ice Company, Inc., closed its books as of December 31, 1921 and filed a return on that basis. As the stock of the corporation had not been properly issued it was deemed advisable to secure a new charter. This charter was acquired on April 7, 1922. It is stated by the corporation that there was no change in the capital or ownership of the stock of the corporation at the time the new charter was secured. It is presumed that the former charter of the corporation has been cancelled.

[fol. 39] In reply you are advised that under the above circumstances the *New Colonial Ice Company, Inc., should file one return including therein the operations of the corporation during the full period January 1 to December 31, 1922.

Respectfully, E. W. Chatterton, Deputy Commissioner.

---

* Note by Louis Baron, Secretary and Treasurer, New Colonial Ice Company, Inc.:

This is evidently a clerical error. It should be "Colonial Ice Corporation" instead of "New Colonial Ice Company, Inc."

In re IT:E:RR CFS

February 14, 1923.

Mr. E. W. Chatterton, Esq., Deputy Commissioner of Internal Revenue, Washington, D. C.

Attention H. C. Armstrong, Chief of Section

DEAR SIR: In reply to your communication of January 31, addressed to the Globe Accounting Company, 276 Fifth

[fol. 40] Avenue, New York City, in which you request certain information before finally passing upon the query contained in the telegram of the Globe Accounting Company, dated January 26th, the following is submitted in answer to the following questions:

1. The name and address of the corporation. A. New Colonial Ice Company, Inc., 8th Ave. and 152nd St., New York City.

2. If a new corporation was organized, the exact date of its incorporation. A. April 7, 1922.

3. Whether the old corporation has been legally dissolved in accordance with the laws of the State under which it is incorporated. A. No.

4. If the old corporation has been legally dissolved, the exact date on which the dissolution took place. A. No.

5. The exact period, opening and closing dates, covered by each return of income filed by the old corporation since January 1, 1917. A. For the calendar year 1921.

6. The exact date or dates on which the books of the old corporation have been closed since January 1, 1917. A. December 31, 1921 and April 13, 1922.

7. Whether there was any change in the capital or owner-[fol. 41] ship of the stock of the corporation at time new charter was acquired. A. No change in ownership or capital.

8. The reason for the corporation securing a new charter. A. The stock of the old corporation not being properly issued, it was deemed advisable to form a new corporation so as to make both regular and in order.

The information desired is whether or not a consolidated re-return can be filed for the old corporation and the new.

Very truly yours, New Colonial Ice Company, Inc.,
Secty-Treas.

LB:AM.

(Here follows Respondent's Exhibit B, side folios 42-45.)

RESPONDENT'S EXHIBIT "B"

42

Form 1120
U. S. Internal Revenue
(Auditor's Stamp)

CORPORATION INCOME TAX RETURN

For Calendar Year 1923

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1924

PRINT PLAINLY CORPORATION'S NAME AND BUSINESS ADDRESS

NEW COLONIAL ICE COMPANY, INC.
(Name)

152nd Street & 8th Avenue,
(Street and Number)

New York, New York.
(Post office and State)

Page 1 of Return
(DO NOT WRITE IN THESE SPACES)

SERIAL NUMBER
41535

FILE CODE

FIRST PAYMENT
$

Examined by
(Cashier's Stamp)

Date of Incorporation April 8, 1922.

Under the Laws of What State or Country New York State

KIND OF BUSINESS Manufacturers of Ice

IS THIS A CONSOLIDATED RETURN? No

Cash, Check, M. O., Cert. of Int.

NOT EXAM I.T.U. ORDER NO. 40

APR 29 1924

GROSS INCOME

1. Gross Sales from Trading or Manufacturing, Less Returns and Allowances					286	304 02
2. Less Cost of Goods Sold						
(a) Inventory at beginning of year			513	67		
(b) Merchandise bought for sale			649	40		
(c) Cost of manufacturing or other processing (exclusive of salaries)		119	049	98		
(d) Total of lines (a), (b), and (c)		120	413	05		
(e) Less inventory at end of year			633	25	119	779 80
3. Gross Profit from Trading or Manufacturing (Line 1 minus Line 2)					166	524 72
4. Gross Profit from Operations Other Than Trading or Manufacturing (Schedule A)						
(a)						
(b)						
(c)						
5. Interest on Bank Deposits, Notes, Mortgages and other sources (Schedule B)					292	64
6. Rents						
Royalties						
Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets (From Schedule D)					1033	34
Dividends on Stock of Domestic Corporations						
Other Income (including dividends received on stock of foreign corporations) (Schedule C)						
Rental of office & board space					240	00
Discount on purchases					26	27
11. Total Income (Items 3 to 10)						166 050 19

DEDUCTIONS

12. Compensation of Officers (From Schedule G)					None	
13. Rent on Business Property						
14. Repairs (From Schedule H)					10	253 28
15. Interest					26	146 60
16. Taxes (From Schedule E)					7	695 63
17. Losses by Fire, Storm, etc. (From Schedule F)						
18. Bad Debts (From Schedule G)						
19. Dividends (From Schedule M)						
20. Depreciation resulting from exhaustion, wear and tear of property (From Schedule I)					48	784 90
21. Reduction of War Facilities						
Depletion of Mines, Oil and Gas Wells, Timber, etc.						
Other Deductions Not Reported Above. (Explain below or on separate sheet)						

(a) Heating expenses	$ 495.22	Settlement of claim for legal services	$350.00
(b) Manager's salary	6000.00	Miscellaneous dues etc	874.75
Office salaries	2738.33	Legal expenses	1400.00
Supplies & expenses	442.32	Auditing	100.00
(c) Insurance	4526.85		16 927 27

24. Total Deductions (Items 12 to 23)						109 807 64
25. Net Income (Item 11 minus Item 24)						56 242 55
Loss as per return for calendar year 1923						$ 519 49

COMPUTATION OF TAX

26. Net Income (Item 25 above)					Balance net income	49 617 96
27. Less Credit of $2,000 for a domestic corporation having a net income of less than $25,000						
28. Balance (Item 26 minus Item 27)		49	617	96		
29. Income Tax 12½% of Item 28						6 202 25
30. If the Net Income of a Domestic Corporation is Less Than $25,000, Enter the Amount in Excess of $2,000						
31. Total Tax (Item 29 plus Item 30)						6 202 25
32. Less: Income Tax Paid at Source (This credit can only be allowed to a nonresident foreign corporation)						
33. Income and Profits Taxes Paid to a Foreign Country or to a Possession of the United States by a domestic corporation						
34. Balance of Tax (Item 31 minus Items 32 and 33)						6 202 25

An amended return must be marked "Amended" at top of return

Checks and drafts will be accepted only if payable at par

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Page 2 of [illegible]

SCHEDULE A.—COST OF MANUFACTURING OR PRODUCING GOODS. (See Instruction 2.)

Items	Amount	Items	Amount (Enter also on line 3)
Labor	$ 51714 46		
Electric Power	54685 86		
Water	5611 00		
Ammonia (actual charges against reserve only	4528 80		
Lubrication	377 38		
Supplies	2132 78		
	119049 98		

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SCHEDULE B.—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 8.)

1. Kind of property	2. Date acquired	3. Amount received	4. Depreciation allowed	5. Cost	6. Value March 1, 1913	7. Improvements since March 1, 1913	8. Net Profit (Enter also on line 9)
62" oak flat top desk	May 1921	$ 15 00	$ 19 21	$ 53 00	$ --	$ --	18 79
Taupe Garnet	June 1921	50 00	353 26	974 60	--	--	1014 55
Carpet	June 1921		292 08	695 39	--	--	
		65 00	624 55	1722 89	--	--	1033 34

SCHEDULE C.—COMPENSATION OF OFFICERS. (See Instruction 12.)

1. Name of officers	2. Official Title	3. Time devoted to business	4. Shares of stock owned: Common	4. Shares of stock owned: Preferred	5. Amount of Compensation (Enter also on line 12)
Willis F. Kirkpatrick	President		50	50	None
Rocco Cea	Vice "		117	117	None
Louis Baron	Secty-Treas.			--	None

SCHEDULE D. COST OF REPAIRS. (See Instruction 13.)

Items	2. Amount (Enter also on line 14)	
Miscellaneous material & Supplies	$ 5587	23
Labor	4666	05
	10253	28

SCHEDULE F.—TAXES PAID. (See Instruction 16.)

1. Items	2. Amount (Enter also on line 21)	
N.Y.State Franchise	$ 400	93
Real estate	7069	20
Federal Capital stock	225	50
	7695	63

SCHEDULE F. EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 17.)

1. Kind of property	2. Date acquired	3. Cost or Value March 1, 1913	4. Improvements since March 1, 1913	5. Depreciation	6. Insurance	7. Salvage Value	8. Net Loss (Enter also on line 17)

SCHEDULE G. BAD DEBTS. (See Instruction 18.)

Year	2. Amount

SCHEDULE H.—DIVIDENDS DEDUCTIBLE. (See Instruction 19.)

1. Name of corporation	Amount of Dividends: 2. Domestic	Amount of Dividends: 3. Foreign

SCHEDULE I. EXPLANATION OF DEDUCTION FOR DEPRECIATION. (See Instruction 20.)

1. Class of property	2. Year Acquired	3. Cost or Value March 1, 1913	4. Estimated Life After Acquisition	5. Value	6. Rate	7. Amount
Buildings - brick	1920	---	33 years	156817 65	4698 71	6375 51
Refrigerating machny. & electrical equipment	Since 1921	New	14 years	47941 21	43549 61	26507 72
Office furniture & fixtures	" "	New	7 "	1873 75	536 64	113 01
Tools not depreciated	" "	New	---	200 00	--	--
				638306 61	48784 86	32996 24

Attach a separate sheet if any of the above schedules do not provide sufficient space.

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Page 8 of Return. SCHEDULE K.—BALANCE SHEETS. (See Instruction 8.)

	Beginning of Taxable Period		End of Taxable Period	
	Amount	Total	Amount	Total
ASSETS.				
1 Cash		$ 7 760 03		$ 4 010 48
2 Notes receivable				1 050 00
3 Accounts receivable	$ 3 126 47		$ 3 006 00	
Less reserve for bad debts	--	3 126 47	--	3 006 00
4 Inventories:				
Raw materials	$		$	
Work in process				
Finished goods Ice on hand	813 67		633 25	
Supplies				
		813 67		633 25
5 Investments (describe fully):	$		$	
6 Loans (describe fully):	$		$	
7 Deferred charges:				
Prepaid insurance	$ 1234 25		$ 1 202 25	
Prepaid taxes	415 62		124 00	
		1 649 87		1 326 25
8 Capital assets:				
Land		145 111 80		145 111 80
Buildings	$ 156 020 26		$ 156 817 65	
Machinery and equipment	471 876 41		479 415 21	
Furniture and fixtures	3 561 44		1 873 76	
Delivery equipment				
Tools	200 00		200 00	
	$ 631 660 11		$ 638 306 61	
Less reserves for depreciation and depletion	33 620 79	598 039 32	81 781 10	556 525 51
9 Patents				
10 Good will		150 000 00		150 000 00
11 Other assets (describe fully):				
Mortgage receivable	$ 17 950 00		$ 12 950 00	
Subscribers to Capital Stock	61 763 00		59 913 00	
Pfd. capital stock issued, consideration not ascertained	600 00	80 313 00	400 00	73 263 00
12 Total Assets		$ 986 014 16		$ 934 925 29
LIABILITIES.				
Loans				
13 Notes payable		$ 6 246 62		$ 6 246 62
14 Accounts payable		333 835 41		238 134 38
15 Accrued expenses (describe fully): State Franchise Tax	--		64 21	
Payrolls	341 17		478 99	
Other taxes	193 60		868 70	
Interest accrued on mortgages	3 918 75		3 712 50	
" " " indebtedness	3 251 17		1 373 40	
Insurance	108 47		271 60	
Ice contract deposits	354 03	8 177 19	329 41	6 298 80
16 Other liabilities (describe fully): Reserve for Federal Tax	---		$ 6 202 25	
Mortgages payable	160 450 00		147 950 00	
Pfd. Capital stock subscribed for	70 200 00		66 200 00	
Deposits on ice contracts	4 300 00		7 600 00	
Reserve for Dividends	913 56	236 613 56	69 94	228 021 69
17 Capital stock:				
Preferred stock (less stock in treasury)	$ 364 800 00		$ 367 800 00	
Common stock (less stock in treasury)	18 240 00	383 040 00	18 390 00	386 190 00
18 Surplus	$ 80 601 38		$ 71 033 80	
19 Undivided profits		80 601 38		71 033 80
20 Total Liabilities		$ 986 014 16		$ 934 925 29

Remarks Balance sheet of the Colonial Ice Corp. at Dec. 31,1923 shows the following item:
Pref. Capital stock of New Colonial Ice Co. $15,200. Pfd.Cap-stock outstanding $12,200.
Common " " " " " 760. Com. " " 3,030.
Total $15,960-Total still outstanding $15,230.
Common issued in excess of preferred to be cancelled 2,270.
Total $15,960.

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SCHEDULE L—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS.

1. Net profit per page 1 of the return			56 242 65	12. Dividends and deductions: (a) Donations, properties, and contributions			2 00
2. Net profit or loss per books				(b) Income and profits taxes paid by the United States and by foreign countries			
3. Income not included in Schedule A, page 2 of this return				(c) Special depreciation taken in excess of that allowed in Schedule A, page 2 of this return			
4. Deductions in Schedule A, page 2 of this return not charged against book income				(d) Special improvements taken against book income but not added to the value of the property account			
5. Reserves for bad debts, depreciation, depletion, etc., charged against book income				(e) Furniture and fixtures, additions, or betterments charged against income			
6. Charges against reserves for bad debts, depreciation, depletion, etc. (to be detailed)				(f) Replacements			
Ammonia		4 628 50		(g) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary			
				(h) Interest on indebtedness incurred or continued to purchase or carry tax-exempt securities, etc. (Section 24 (5))			
7. Total of Lines 1 and 2		60 771 05		(i) Additions to reserves for bad debts which are not included in Schedule A, page 2 of this return			
8. Total from Line 6		10 838 63		(j) Additions to reserves for depreciation, depletion, etc., not included in Schedule A, page 2 of this return			
9. Net profit for the year as shown by books of account (Line 7 less Line 8)		60 432 42		(1) Reserve for ammonia		3 984 38	
10. Profit for the year as computed in Schedule A, page 2 of this return		20 501 36		(2) Reserve for Fed.Inc.Tax		6 208 25	
(1)				(3)			
(2)				(4) Other deductions (to be detailed)			
(3)				(1) Common stock Bonus		150 00	
11. Total		71 033 80		(2)			
12. Total of Lines 10 and 11		71 033 80		(3)			
13. Total of Schedule A, page 2 of this return				14. Total of Line 11		10 338 63	
14. Net income per Line 12		71 033 80		15. Dividends paid during the taxable period (state whether paid in cash, stock or other property)			
				(a) Date paid Character			
				(b) Date paid Character			
				(c) Date paid Character		None	
				(d) Date paid Character			
				16. Other deductions (itemize)			
				(1)			
				(2)			
				(3)			
				17. Total of Line 16			

QUESTIONS.

KIND OF BUSINESS.

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes and follow this by a special description of the business activity to enable the information called for under each general class.

A.—Agriculture and related industries, including fishing, horse racing, etc., and also the leasing of such property. State the product or products. B.—Mining and quarrying, including gas and oil wells, and also the leasing of such property. State the product or products. C. Manufacturing. State the product and also the material if not implied by the name of the product. D.—Construction work, as streets, buildings, bridges, railroads, ships, etc., also equipping and installing same with systems, devices, or machinery, without their manufacture. State nature of structures built, materials used, or kind of installations. E1. Transportation: rail, water, local, etc. State the kind and use of product transported, if any. E2. Public utilities: gas, natural, coal, or water; electric light or power; telephone or telegraph; railroad; terminals or hot water independence, waterworks or sewer. E3. Storage or other products or goods (other than refrigerated), warehouses, etc. [illegible] etc. State product stored. E4. Leasing transportation or utilities. State kind of property. F. Trading, not elsewhere classified, and not personal services. State the service. H. Finance, including banking, [illegible] insurance. I.—Concerns not falling in above classes (a) because of combining [illegible] with no predominant business, or (b) for other reasons.

2. If business involves activity falling in two or more of the above classes, as to the same product is concerned, should report business as identified with each of the above general classes; for example, concerns in A or H which also transport and market the their own product exclusively or mainly, should fill in identical with classes A or B; concerns in C (manufacturing) which own or control their source of raw material supply in A or B and which also transport, sell, or install their own product exclusively or mainly, should be identified with manufacturing; concerns in D may control or own [illegible] of materials used exclusively or mainly in their construction [illegible] concerns in E may own or control the source of their material or power, [illegible] the cost of or share their own conclusion, but its production would identify them with A or C.

3. Answer

(Insert above key letter designation) C

4. Main corresponding business more specifically the information called for under each key letter, also whether operating as principal, or as a jobber on commission, etc. If inactive or in liquidation.

Manufacture of ice
Finsipal

AFFILIATIONS WITH OTHER CORPORATIONS.
TO BE ANSWERED BY EVERY CORPORATION.

4. [illegible] directly or indirectly affiliated interests or by a [illegible] per cent of the voting capital stock of [illegible]

[illegible]

[illegible] that are affiliated?

[illegible] control of the capital stock of any other corporation [illegible] by the same individuals pro rata to their stock holdings?

[illegible] If the answer to [illegible] is "yes," answer the following questions, Form 851, for each [illegible]

[illegible] If the answer to the question in [illegible] is "yes," a statement showing the information called for in questions 4, 5, or 6, as may be necessary to explain the [illegible] and the [illegible] and [illegible] are answered "yes."

(8) Did substantially the same conditions, as are set out in the questionnaire filed for 1927 or prior years, obtain during the entire calendar year ended in 1928? [illegible] If the answer to this question is "no," a statement, setting forth the particulars in which the situation has changed, should be attached to and made a part of this return. If there have been substantial changes in stock ownership, a complete schedule of such changes should be submitted on Form 848, Affiliations Schedule 1. If the corporation is not now affiliated with any other corporation through stock ownership, but was affiliated with one or more such corporations during the whole or any part of the taxable year, Forms 851, 852, and 853 are required for the entire group for the taxable period.

(9) Did the corporation elect to file a consolidated return for this and subsequent years? [illegible]

(10) Did the corporation file a consolidated return for the preceding taxable period? [illegible] If the answer is "yes," state which of such taxable period basis?

PREDECESSOR BUSINESS.

5. Did the corporation file a return under the same name for the preceding taxable period? Yes If not, was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during the whole or the preceding taxable period? [illegible] If answer is "yes," give name and address of each predecessor business.

BASIS OF RETURN.

6. Is the return made on the [illegible] basis of income or [illegible] No

If not, the [illegible] the basis used and the [illegible]

Accrual basis

AMORTIZATION.

[illegible] 20 If the answer to the above question is "yes," [illegible] and the amount of each year [illegible]

LIST OF ATTACHED SCHEDULES.

If [illegible] attached to this return, giving for each a brief [illegible]

None

AFFIDAVIT.

We, [illegible] and severally make oath and say that we are the corporation by which the return is made, that we are severally duly authorized by such corporation to make this affidavit, and that this return, including the accompanying schedules and statements, has been examined by us and is, to the best of our knowledge and belief, a true and complete return made in good faith for the taxable period stated, pursuant to the Revenue Act of 1928 and the Regulations issued under authority thereof.

Sworn to and subscribed before me this 15 day of March, 1929.

Anthony Pellegrino Jr (Title)

Elliott R. Kingsbury
Treasurer

(Title)

NAY

New York County
No. 6

B-4 6

* See copy of our letter of Feb' 14, 1929 addressed to Collector of Int. Rev. attached hereto.

[fol. 46] Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:E:RR. CFS.

February 28th, 1923.

Mr. Louis Baron, Secretary and Treasurer, New Colonial Ice Company, Inc., Foot of East 138th Street, New York City.

SIR: Receipt is acknowledged of your letter of February 14, 1923, in further reference to the New Colonial Ice Company, Inc., Eighth Avenue and 152nd Street, New York, New York, filing one return for the full calendar year 1922.

It appears that the *New Colonial Ice Company, Inc., closed its books as of December 31, 1921, and filed a return on that basis. As the stock of the corporation had not been properly issued it was deemed advisable to secure a new charter. This charter was acquired on April 7, 1922. It is stated by the corporation that there was no change in the capital or ownership of the stock of the corporation at the time the new charter was secured. It is presumed that the former charter of the corporation has been cancelled.

[fol. 47] In reply you are advised that under the above circumstances the *New Colonial Ice Company, Inc., should file one return including therein the operations of the corporation during the full period January 1 to December 31, 1922.

Respectfully, (S.) E. W. Chatterton, Deputy Commissioner.

---

*Note by Louis Baron, Secretary and Treasurer, New Colonial Ice Company, Inc.:

This is evidently a clerical error. It should be "Colonial Ice Corporation" instead of "New Colonial Ice Company, Inc."

In re: IT:E:RR. CFS

February 14, 1923.

Mr. E. W. Chatterton, Esq., Deputy Commissioner of Internal Revenue, Washington, D. C.

Attention H. C. Armstrong, Chief of Section

DEAR SIR: In reply to your communication of January 31, addressed to the Globe Accounting Company, 276 Fifth Avenue, New York City, in which you request certain in- [fol. 48] formation before finally passing upon the query contained in the telegram of the Globe Accounting Company, dated January 26th, the following is submitted in answer to the following questions:

1. The name and address of the corporation. A. New Colonial Ice Company, Inc., 8th Ave. and 152nd St., New York City.

2. If a new corporation was organized, the exact date of its incorporation. A. April 7, 1922.

3. Whether the old corporation has been legally dissolved in accordance with the laws of the State under which it is incorporated. A. No.

4. If the old corporation has been legally dissolved, the exact date on which the dissolution took place. A. No.

5. The exact period, opening and closing dates, covered by each return of income filed by the old corporation since January 1, 1917. A. For the calendar year 1921.

6. The exact date or dates on which the books of the old corporation have been closed since January 1, 1917. A. December 31, 1921 and April 13, 1922.

7. Whether there was any change in the capital or ownership of the stock of the corporation at time new charter was acquired. A. No change in ownership or capital.

[fol. 49] 8. The reason for the corporation securing a new charter. A. The stock of the old corporation not being properly issued, it was deemed advisable to form a new corporation so as to make both regular and in order.

The information desired is whether or not a consolidated return can be filed for the old corporation and the new.

Very truly yours, New Colonial Ice Company, Inc.,
(S.) Louis Baron, Secretary and Treasurer.

(Here follows exhibit, side folios 50 and 51)

50

TREASURY DEPARTMENT
INTERNAL REVENUE BUREAU
Form 7709

CORPORATION AUDIT WORK SHEET
FOR CALENDAR YEAR 19 23

Or for period begun ..... , 19..... , and ended ..... , 19.....

Name of Corporation New Colonial Ice Co.

Street and Number .....

Post Office and State New York N.Y.

Gr[illegible]ome $..... Closing Inventory $..... (Indicate cost or cost or market) Class by R. A. ..... by Reviewer .....

Section 21

Unit 2111

Resident Auditor C.W. Bailey

Reviewed C.W.B. Wm Barry

Date	Time Consumed From—	To—	Total

Adjustments to Income

Net income reported ..... $ 56 242.17

Additions:

Donations	$	
Life insurance premiums		
Income tax		
In[illegible]tion expense		
Ex[illegible]e depreciation		
Shareholders' tax		
Losses		
Furniture and fixtures		
Additions and betterments		
Renewals and replacements		
Total additions		$
Total		$

Deductions:

	$	
Total deductions		$
Net income as adjusted		$

Analysis of Surplus

Surplus at beginning of year		$
Undivided profits		
Reserve for		
" "		
Net income reported		
Nontaxable income		
Total		$
Deductions:		
Income tax preceding year	$	
Income tax years prior to preceding year		
Donations		
Dividends		
Losses not allowed		
Total deductions		$
Surplus at end of year		
Shown on Balance Sheet:		
Surplus	$	
Undivided profits		
Reserves		
"		
Total		$
Income overstated		$
" understated		$

Depreciation Schedule

Kind of Property	Cost or Mar. 1, 1913, value	Rate of Depreciation	Amount Claimed	Amount Allowed	Amount Disallowed
	$	$	$	$	$

8—11768

B-8 Total amount disallowed ..... $

9

Adjustments to Invested Capital

Deduction for Dividends

Dividend paid (Within 60 days) ..... $

Prorated for ..... days ..... $

... earnings for year ..... $

Tentative tax for year ..... $

Amount available for dividends ..... $

Dividends paid ..... $

Earnings for ..... days ..... $

Paid from surplus ..... $

Prorated for ..... days ..... $

Dividends paid ..... $

Earnings for ..... days ..... $

Paid from surplus ..... $

Prorated for ..... days ..... $

Deduction for Inadmissibles

	Inadmissibles	Admissibles
Opening balance sheet	$	$
balance sheet	$	$
Total	$	$
Average	$	$

Deduction for Intangibles

Total intangibles included ..... $

Amount allowed ..... $

Amount disallowed ..... $

Capital Stock and Surplus

Capital stock ..... $

Less treasury stock ..... $ ..... $

Surplus ..... $

Undivided profits ..... $

Reserves ..... $

Total ..... $

Additions:

Sale of stock—

..... $ ..... ds .....

..... $ ..... ds ..... $

..... $ ..... ds ..... $

Overpayment of tax in prior years ..... $

Depreciation disallowed prior years ..... $

Capital expenditures disallowed prior years ..... $

..... $

..... $

Total additions ..... $

Deductions:

Preceding year's tax (.....) $.....(prorated) $

Additional tax prior to above ..... $

Intangibles ..... $

Dividends (singly) ..... $

..... $

..... $

..... $

Total deductions ..... $

Balance ..... $

Inadmissibles % ..... $

Invested capital (full year) ..... $

Excess Profits Tax

Invested capital for period ..... mo., $ .....

Exemption for period ..... mo., $ ..... Excess profits credit, $ .....

Computation of Tax under Section 301

1. Brackets	2. Net Income	3. Excess Profits Credit	4. Balance Subject to Tax	5. Rate	6. Amount of Tax
1. of invested capital	$	$	$	20%	$
2 ...nce of income				40%	
Totals	$	$	$		$

Tax under Section 302, $ .....

Net Income ..... $ 5-6242.53

Less: Interest on U. S. obligations not exempt ..... $

Profits tax .....

Exemption .....

Balance subject to tax at 10% ..... $ 56242.53

Amount of tax at 10% ..... $ 7030.32

Total tax assessable 7030.32

Original tax 6202.25

Additional tax ..... Addl tax $28.07

Penalty .....

Total amount due ..... $

Total profits tax, $ ..... $ 7030.32

Remarks .....

D-9

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[fol. 52] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 27726

24 B. T. A. —

NEW COLONIAL ICE CO., INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

FINDINGS OF FACT AND OPINION.—Promulgated, November 24, 1931

A new and separate corporation, organized to take over the business, assets and liabilities of its predecessor, is not entitled to carry forward net losses of its predecessor for 1921 and the period January 1, 1922, to April 13, 1922, in computing its income for the period April 14, 1922, to December 31, 1922.

Joseph Sterling, Esq., for the Petitioner.
John D. Kiley, Esq., for the Respondent.

This proceeding involves deficiencies in income tax as determined by the Commissioner for 1922 and 1923 in the respective amounts of $4,853.06 and $828.07. In addition, the Commissioner, by way of affirmative relief, has asked for an increase in the deficiency for 1922 from $4,853.06 to [fol. 53] $6,282.93. The only question involved is whether the petitioner, in determining its tax liability, for the period from the date of its organization on April 14, 1922, to December 31, 1922, may have the benefit of the net losses sustained by its predecessor for 1921 and the period January 1, 1922, to April 13, 1922.

FINDINGS OF FACT

The following stipulation of the facts involved was submitted:

(A) Colonial Ice Corporation (hereinafter referred to as the "old company"), was incorporated under the Laws of the State of New York, on April 20th, 1920. Its authorized capital was $750,000, consisting of 6500 shares of preferred stock of $100.00 par value, and 20,000 shares of common stock, of $5.00 par value.

(B) The corporation was promoted by one, Edmon C. Turner, who had associated with him, his wife, Florence C. Turner, and one Michael DeCarlo. These persons instituted a stock-selling campaign among small ice and coal dealers in the City of New York. The stock was sold in units of one share of common and one share of preferred, the sale price per unit being $100.00.

(C) The corporation purchased a block in Manhattan, New York, bounded by Eighth Avenue, McCoombs Place, 151st Street and 152nd Street. On this block, there were substantial buildings, susceptible to alterations into an ice-[fol. 54] plant. Extensive contracts were entered into for structural improvements and for the installation of refrigerating machinery in the building. The largest contract was with the De La Vergne Machine Company. The Contracts with the De La Vergne Machine Company and with the other creditors who installed equipment provided that the title to the property installed remained in the vendor until the purchaser price was fully paid.

The installation of equipment proceeded to a point when, in about August, 1921, the plant was in condition to operate at approximately forty per cent of the entire capacity contemplated. At that time, the Company owed creditors approximately $285,000, and was not in a financial condition at that time to liquidate this indebtedness or to supply the additional equipment required to operate at a profit.

(D) The inability of the Company to meet its obligations resulted in the creditors forming a Creditors' Committee, which acted through the De La Vergne Machine Company, and in the organization of a Stockholders' Committee.

(E) The Creditors' Committee caused an investigation to be had of the affairs of the Company. It was discovered that the promoters had caused the issuance of a large number of shares, for which no consideration had been received by the corporation, and that much of this stock was not even recorded in the records of the company.

[fol. 55] (F) Because of this situation, Turner resigned as an officer and director of the company, disassociating himself from any connection therewith. He reassigned to the corporation the shares of stock which had been improperly

issued to him and consented to the cancellation of these shares of stock. The company also procured surrender for cancellation of such other certificates of stock as were improperly issued and of which it had acquired knowledge through the investigation.

After these shares had been returned to the corporation and cancelled, it was ascertained that 3385 shares of preferred stock and the same number of shares of the common stock of the corporation had been legally issued and recorded.

(G) In August, 1921, at the instigation of the creditors of the company, a stockholders' meeting was held, at which time new officers and directors of the creditors' choosing were elected. Protracted negotiations, commencing in August, 1921, and extending to April, 1922, were had between the creditors and the bona fide stockholders. These negotiations resulted in the Colonial Ice Corporation entering into an agreement with the De La Vergne Machine Company, acting on behalf of itself and other creditors. (copy of which agreement is attached hereto as "Exhibit A" and made a part hereof).

The agreement referred to in the last paragraph above of [fol. 56] the stipulation recites an indebtedness of the old company to creditors of approximately $285,000 and its inability to pay such indebtedness; that in order to complete the plant it was necessary for the De La Vergne Machine Company (the largest creditor) to furnish and install additional machinery, funds for the payment of which were not available; and that the old company was desirous of accepting a proposed "scheme of reorganization" under which the creditors would agree to complete the plant and grant a reasonable time within which to pay its present indebtedness and also the cost of the additions to the plant. Then there followed covenants and provisions in substance as follows:

1. The old company agreed that it would cause a new corporation to be organized under the laws of New York to be called the "New Colonial Ice Company, Inc.," and with a capitalization as follows:

6,000 shares of cumulative 6 per cent non voting preferred stock of $100 par value per share and 20,000 shares

of common stock at $5.00 par value per share, the Charter and By-laws of said Corporation to provide for a Board of Directors of seven members, and that the date upon which said preferred stock shall commence to accumulate its dividends shall be from the date of issue.

2. The old company would enter into an agreement with the aforementioned new company to sell to the latter all of the former's assets of every nature and description and in [fol. 57] consideration therefor would accept the undertaking of the new company to assume and pay all of its indebtedness and as further consideration would accept approximately 3,400 shares of preferred stock and the same number of voting trust certificates for common stock of the new company.

3. The creditors agreed to complete the plant at a cost of approximately $132,000 and to extend the time for the payment of the old and new indebtedness for a period not to exceed five years, provided,

(a) That paid in subscriptions for the stock of said New Colonial Ice Company, Inc., shall be received by it to the amount of $100,000 before this agreement shall become binding upon said De La Vergne Company, unless De La Vergne Company shall hereafter waive this provision.

(b) That at a special meeting of the stockholders of the Ice Corporation to be called, there shall be a vote of not less than two thirds of all the stockholders in favor of carrying through said scheme of reorganization.

(c) That all profits from the operation of said plant and all receipts from the sale of stock or other property of the corporation or otherwise shall be used for payment of the corporation's indebtedness as rapidly as said profits or receipts may be received having due regard for leaving in the treasury of said Company funds reasonably sufficient for the carrying on of its then business.

[fol. 58] (d) That control of the management of said Company through a voting trust agreemnt of all of its common stock shall be vested in De La Vergne Company until the entire indebtedness of the Company shall have been paid or sufficiently paid so as in the sole judgment of the De La Vergne Machine Company to warrant it in giving up

said control, it being understood and agreed that the stockholders shall be entitled to be represented on the Board of Directors of said Company by three out of the seven members of the Board who shall be designated by the preferred stockholders.

(e) That as part of the consideration to De La Vergne Machine Company to go forward with the completion of the plant and to extend the time of payment of said indebtedness, the New Colonial Ice Co., Inc., shall issue and deliver to De La Vergne Machine Co., the entire amount of its common stock in order that, and De La Vergne Machine Co. so agrees, said common stock may then be placed in a voting trust to terminate after five years or at such earlier date as the said indebtedness may be paid and in order further that said common stock, or voting trust certificates therefor, may be returned into the treasury of the Company as full paid stock.

(f) That interest shall accrue and be paid upon said indebtedness at the rate of 6% per annum from March 1st, 1922.

[fol. 59] 4. A further provision in the agreement follows:

Fourth. De La Vergne Machine Company agrees that so long as it is in control of the management of said Company there shall be no salaries paid to officers of the Company, except to the Manager thereof; that no commission shall be paid for the sale of the stock of the Company; that no bonus stock shall be issued except along with the sale of the preferred stock; that no common stock shall be sold by the Company, except as herein provided, except with an equivalent number of shares of preferred stock unless with its consent and with the consent of a majority vote of the preferred stockholders of said Company at a special meeting called for that purpose, a provision to this effect to be endorsed upon the common stock certificates, and further covenants and agrees that it will terminate or cause to be terminated the voting trust agreement and will turn over the management of the Company to the stockholders without conditions of any kind as soon as payment of all the Company's indebtedness shall have been made, and, if the preferred stockholders shall at any time devise a plan whereby sufficient

monies may be raised to pay in full the indebtedness then due to the creditors, the voting trustees and directors will take such formal actions and give such assents as may be necessary and proper to effectuate such plan, under advice of counsel and proper safe-guards to ensure the position of the creditors until such time as the indebtednes may be paid.

[fol. 60] The stipulation as agreed upon by the parties then continues:

(H) Pursuant to the agreement dated April 13, 1922, the petitioner, New Colonial Ice Company, Inc., was incorporated under the Laws of the State of New York, with a capitalization of $700,000, consisting of 6,000 shares of preferred stock of the par value of $100.00 per share, and 20,000 shares of common stock, of the par value of $5.00 per share, (as is evidenced by the attached Certificate of Incorporation, which is made a part hereof as "Exhibit B").

As of the date of the incorporation of the new company, the assets and liabilities of the old company were and became the assets and liabilities of the new company.

(I) At the time when this transaction was consummated, there were outstanding 3,385 shares of preferred stock and a like amount of common stock of the old company. Accordingly, the issued stock of the new company was, as follows: 3,385 shares of preferred stock and 3,385 shares of common stock.

The preferred stock was issued to the old company, which corporation thereupon reassigned and redelivered said certificate for 3,385 shares of preferred stock to the new company, with directions that it should cancel said certificate and issue and deliver certificates for such preferred stock to such persons, firms or corporations as the old company might direct. The 3,385 shares of common stock [fol. 61] of the new Company were issued to Louis Baron, Fred Nolte, and Robert D. Eggleston, as Voting Trustees, pursuant to said agreement.

Said Voting Trustees thereupon issued voting trustees' certificates for 3,385 shares to the old company, which company thereupon endorsed and redelivered said certificate of 3,385 shares to the said Voting Trustees, with directions that they should cancel said certificate and issue voting

trustees' certificates to such persons, firms or corporations as the old company might thereafter direct.

That thereafter, the stockholders of the old company, with the exception of stockholders owning 247 shares of each class of stock, surrendered their stock to the old company and received from the new company, on direction from the old company share for share of preferred stock of the new company for preferred stock in the old company, and received from said voting trustees, voting trustees' certificates of common stock in the new company, share per share, for the common stock so surrendered, and the old company immediately retired and cancelled the preferred and common stock surrendered.

(J) The new company held 247 shares of preferred stock and the Trustees held 247 shares of the voting trustees' certificates in the new company available to those stockholders of the old company who had not as yet turned in [fol. 62] their shares in the old company for surrender and exchange, pursuant to the terms of the agreement referred to in paragraphs "G" and "H" herein. Up to and including December 31, 1922, these shares of preferred stock and voting trust certificates were still held unexchanged.

Subject to objection on the part of the respondent as to its relevancy and materiality, it is further stipulated, that in years subsequent to 1922 the stockholders holding 247 shares of preferred stock, and a like amount of common stock in the old company ultimately exchanged this stock for a like amount of preferred stock and voting trust certificates in the new company.

(K) The old company's corporate existence continued throughout 1922 and 1923. It transacted no business and had no assets.

(L) The agreement of April 13, 1922, continued until April 9th, 1927, at which date the voting trust terminated and the common stock of the new company was exchanged in place of voting trust certificates theretofore held by stockholders. With the termination of the voting trust, the creditors relinquished such management and control as they might theretofore have had under the aforementioned agreement.

(M) The assets and liabilities of the old company became the assets and liabilities of the new company as at the date of incorporation of the latter.

(N) It is further stipulated and agreed that the statu-
[fol. 63] tory net losses of the old company for the calendar year 1921, was the sum of $36,093.19.

(O) It is further stipulated and agreed that for the period commencing January 1, 1922, and ending April 13, 1922, the old company sustained a statutory net loss in the sum of $10,338.90.

(P) It is further stipulated and agreed that for the period commencing April 14, 1922, up to and including December 31, 1922, the net income of the new company was the sum of $48,763.43.

(Q) It is further stipulated and agreed that the net income of the new company for the calendar year 1923 was in the amount of $56,242.55.

Opinion

Seawell:

In contesting the deficiencies proposed by the Commissioner it is the contention of the petitioner that in determining its tax liability for the period April 14, 1922, to December 31, 1922, it should have the benefit of the net losses sustained by the Colonial Ice Corporation (herein referred to as the "old company") for the calendar year 1921 and the period January 1, 1922, to April 13, 1922, under the provisions of Section 204 of the Revenue Act of 1921. In the first place, it is urged that the petitioner and the old company were affiliated and therefore under the principle laid down in Alabama By-Products Corp., et al., 18 B. T. A. 919, the petitioner would receive the benefit of
[fol. 64] the old company's net losses in determining consolidated net income for the period April 14, 1922, to December 31, 1922. We, however, fail to see any basis for affiliation of the two companies. What occurred was that the petitioner's preferred stock was issued to the old company and its common stock to voting trustees, who in turn issued voting trustees' certificates to the old company. The old company thereupon redelivered the preferred stock and voting trustees' certificates so received to the new com-

pany with directions to deliver the preferred stock and voting trustees' certificates for common stock to such persons as it (the old company) might direct. Thereafter, the stockholders of the old company, with the exception of those owning 247 shares of each class of stock, surrendered their stock to the old company and received from the new company, on direction from the old company, share for share of preferred stock of the new company for preferred stock of the old company and voting trustees' certificates of common stock in the new company, share for share, for the common stock of the old company. The old company thereupon cancelled and retired the old stock so surrendered. The old company then had outstanding only 247 shares of stock and these old stockholders were in no sense stockholders of the new company. And, further, the preferred stock and trustees' voting certificates for common stock of the new company, which were held available for exchange when the minority saw fit to turn in its stock, were not held by the old company but by the new. Manifestly, we have here neither the semblance of ownership or control by one corporation of substantially all the stock [fol. 65] of another corporation nor substantially all the stock of the two corporations owned or controlled by the same interests as required by Section 240 of the Revenue Act of 1921 in order to permit an affiliated status.

In the next place, as an alternative, it is contended that for the purpose of granting the relief sought the separate legal entities should be disregarded and the new company considered as if it were the "taxpayer" which sustained the "net losses". We are convinced that this can not be done. The mere fact that the new corporation was incorporated under the laws of the same state as the old corporation does not necessarily mean that each corporation has the same rights, franchises, powers, privileges and immunities. In fact, one of the very apparent purposes of the formation of the new corporation was to create a corporation which was separate and distinct from the old corporation. In addition to the financial difficulties which faced the old corporation, it was found that a large number of shares of stock had been issued without consideration and that much of this stock had not been recorded on the books of the company. In this situation it was important from the point of view of both the creditors and the bona fide stockholders that the new corporation to which

the assets would be transferred would be something entirely different from the old corporation, spurious stock of which might still be in existence. The certificate of incorporation of the petitioner was submitted in evidence but not that of the old company, and therefore we are unable to make proper comparison of their likenesses [fol. 66] and/or differences. However, we are unwilling to say that because the assets and liabilities of the old company became those of the new and that the stockholders of the old company to whom stock was issued received stock of a like character and amount in the new company the changes from the old to the new company were mere changes of form which would permit us to say that the petitioner is to all intents and purposes the same "taxpayer" as its predecessor. We are accordingly of the opinion that the petitioner may not have the benefit of the net losses sustained by its predecessor for 1921 and the period January 1, 1922, to April 13, 1922. The Maytag Co., 17 B. T. A. 182; Standard Silica Co., 22 B. T. A. 97; Athol Manufacturing Co., 22 B. T. A. 105; and Clark Dredging Co., 23 B. T. A. 503.

The parties have stipulated the net income of the petitioner for the period April 14, 1922, to December 31, 1922, and for the year 1923 and the deficiencies should be computed upon that basis.

Judgment will be entered under Rule 50.

A True Copy. Teste:

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.

(Seal.)

[fol. 67] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 27726

NEW COLONIAL ICE CO., INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the findings of fact and opinion of the Board promulgated November 24, 1931, the respondent on De-

cember 16, 1931, filed notice of settlement under Rule 50. Copy of said notice having been served on the petitioner together with notice of hearing, and the proceeding having been called for settlement from the Day Calendar of January 6, 1932, at which time no objection to the proposed settlement was offered, it is

Ordered and Decided: That there are deficiencies in tax for the period April 14 to December 31, 1922, and for the calendar year 1923 in the amounts of $6,095.43 and $828.07, respectively.

(Signed) H. E. Seawell, Member.

Enter: Entered Jan. 8, 1932.

A True Copy. Teste:
B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

[fol. 68] In United States Circuit Court of Appeals, for the Second Circuit

[Title omitted]

Petition for Review—Filed May 23, 1932

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petitioner, feeling itself aggrieved by the decision, order and decree made and entered into in this cause, hereby petitions for a review of the decision, order and decree by the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignments of error which are filed herein and made part thereof, and respectfully shows:

1. That it is a company duly organized under and by virtue of the laws of the State of New York.

2. The respondent determined a deficiency for the calendar years of 1922 and 1923 against the petitioner herein [fol. 69] in the total sum of $5,681.13. Respondent duly sent to the petitioner by registered mail, a notice of its said deficiency. Thereafter the petitioner filed an appeal from the said notice of deficiency with the United States Board

of Tax Appeals. On November 24, 1931, the Board of Tax Appeals promulgated its findings of fact and opinion in this appeal and on January 8th, 1932, the Board entered its judgment and final order of redetermination wherein and whereby the Board ordered and decided the amount of deficiencies for the period from April 14th, 1922 to December 31, 1922 at $6,095.43, and for the calendar year of 1923 at $828.07.

3. Petitioner herein and the respondent submitted the issues to the United States Board of Tax Appeals on a stipulated and agreed statement of facts. As appears from said stipulated facts, the petitioner was incorporated pursuant to a scheme of reorganization embodied in a written agreement between a predecessor corporation, known as the Colonial Ice Corporation, hereinafter referred to as the "old company" and the creditors of said Colonial Ice Corporation, whereby the petitioner took over the assets and assumed the liabilities of the "old company" and creditors agreed to complete the plant of the "old company", and the stock of the new company was issued in a manner more specifically set forth in said stipulation of facts. The "old company" had substantial losses in the year of 1921 and from January 1st to April 13th, 1922.

4. The sole issue involved in this proceeding before the [fol. 70] Board of Tax Appeals, was whether the petitioner should have the benefit of the net losses sustained by the "old company" for the calendar year of 1921 and the period of January 1, 1922 to April 13th, 1922, under the provisions of Section 204 of the Revenue Act of 1921. It was the petitioner's contention that the petitioner and the "old company" were affiliated and the petitioner should receive the benefit of the "old company's" net losses in determining consolidated net income for the period of April 13th, 1922 to December 31st, 1922. It was the petitioner's further contention that the separate legal entities of the "old company" and the petitioner should be disregarded, and the petitioner considered as if it were taxpayer and sustained the net losses. The Board of Tax Appeals held that the "old company" and the petitioner were not affiliated and that the separate legal entities should not be disregarded. It found a deficiency against the petitioner and

entered its final order redetermining the tax against the petitioner herein.

5. Petitioner says that in the record and proceedings before the Board of Tax Appeals, and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals, manifest errors occurred and intervened to the prejudice of the petitioner and the petitioner assigns the following errors, each of which it avers occurred in the record, proceedings, decision and final order of redetermination and upon which it relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals.

[fol. 71] ASSIGNMENTS OF ERROR

1. The Board of Tax Appeals erred in finding that such of the stockholders of the old company who had not surrendered their stock to the old company and received from the petitioner preferred stock and voting trust certificates of common stock, were in no sense stockholders of the petitioner.

2. The Board of Tax Appeals erred in holding that the preferred stock and voting trust certificates of the common stock, which were held available for exchange when the minority so failed to turn in its stock, were not held by the old company, but by the petitioner.

3. The Board of Tax Appeals erred in holding that there was neither the semblance of ownership or control by one corporation of substantially all the stock of the two corporations or owned or controlled by the same interests as required by Section 240 of the Revenue Act of 1921, in order to permit an affiliated status.

4. The Board of Tax Appeals erred in holding that the petitioner and the old company were not affiliated and that the petitioner was not entitled to receive the benefit of the old company's net losses in determining the consolidated net income.

5. The Board of Tax Appeals erred in its failure to hold that the formation of the petitioner under the laws of the

same state as the old company and with the same assets and liabilities and with the stock of the same character and denomination of the old company, were not changes in substance but only changes in form.

[fol. 72] 6. The Board of Tax Appeals erred in its failure to hold that the plan of reorganization and the consequent formation of the petitioner herein, were merely devices whereby the beneficial interests and stockholders and creditors remained as theretofore, and in failing to hold that the entities of the old company and the petitioner were, in effect, one.

7. The Board of Tax Appeals erred in ordering and deciding that there were deficiencies against the petitioner.

8. The Board of Tax Appeals erred in entering judgment and issuing its final order of redetermination, for the respondent, and against the petitioner.

Wherefore, the petitioner petitions that the decision, judgment, and order of the Board of Tax Appeals be reviewed by the United States Board of Tax Appeals for the Second Circuit, and that a transcript of the record be prepared in accordance with the law and with the rules of the said Court and transmitted to the Clerk of the said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the said Court, and that the decision, judgment and order of the Board of Tax Appeals be reversed.

Respectfully submitted, Joseph Sterling, Counsel for Petitioner, 51 Madison Avenue, New York City.

[fol. 73] *Duly sworn to by Joseph Sterling. Jurat omitted in printing.*

[fol. 74] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW

Clarence M. Charest, Esq., General Counsel, Bureau of Internal Revenue, Bureau of Internal Revenue Building, Washington, D. C., Attorney for Respondent on Review:

Notice is hereby given to you that the New Colonial Ice Co., Inc., the petitioner on review in the above entitled proceeding, did on the 23rd day of May, 1932, file with the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision rendered by said Board of Tax Appeals in said proceeding, a copy of which said petition for review as filed is herewith served upon you.

Joseph Sterling, Counsel for Petitioner on Review, 51 Madison Avenue, New York City.

Service of the foregoing notice and a copy of the petition for review mentioned in said notice is acknowledged this — day of May, 1932.

C. M. Charest (S), Counsel for Respondent on Review.

[fol. 75] Received June 30, 1932. U. S. Board of Tax Appeals

Letter

Joseph Sterling, Counselor at Law, 51 Madison Avenue, New York

June 29th, 1932.

Clerk United States Board of Tax Appeals, Washington, D. C.

In re New Colonial Ice Co., Inc., v. Commissioner of Internal Revenue, Docket No. 27726

DEAR SIR: In connection with the præcipe heretofore filed in the above entitled action, will you kindly omit from the same item No. 4, namely, the transcript of hearing of March 30th and April 1st, 1931.

I trust that the rest of the items are in proper form and that no further proceedings need be taken on my part to

settle the record, and have it forwarded for printing. If such is not the case, will you kindly advise me.

Very truly yours, Joseph Sterling, by Robert H. Sterling.

[fol. 76] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE FOR TRANSCRIPT—Filed June 14, 1932

To the Clerk of the U. S. Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the U. S. Circuit Court of Appeals for the Second Circuit, copies duly certified as correct, of the following documents and records in the above entitled proceeding in connection with the petition for review by the said U. S. Circuit Court of Appeals for the Second Circuit heretofore filed by the respondent herein:

1. Docket entries of proceedings before the Board.
2. Petition.
3. Amended answer.

[fol. 77] 4. Transcript of hearing of March 30 and April 1, 1931 (omit, see letter 6/29/32, page 67).

5. Stipulation of facts filed with Board.
6. Petitioner's Exhibit 1.
7. Respondent's Exhibits A and B.
8. Findings of fact, opinion and decision of the Board.
9. Decision entered.
10. Petition for review together with proof of notice of filing same.
11. This præcipe.

Joseph Sterling, Counsel for Petitioner, 51 Madison Ave., New York, N. Y.

[fol. 78] Clerk's certificate to foregoing transcript omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

No. 218

Argued June 12, 1933. Decided July 17, 1933

NEW COLONIAL ICE CO., INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

Before Manton, L. Hand, and Augustus N. Hand, Circuit Judges

Petition to review the determination of the Board of Tax Appeals. The Board sustained the Commissioner's determination as to income taxes for the years 1922 and 1923. The taxpayer appeals. Determination affirmed. (24 B. T. A. 886).

Joseph Sterling, of New York City, for petitioner.

Sewall Key and John H. McEvers, Sp. Assts. to Atty. Gen., for respondent.

MANTON, Circuit Judge:

The petitioner seeks a review of deficiencies of income taxes for the year April 14, 1922, to December 31, 1922, and for the calendar year 1923. Revenue Act 1926, §§ 1001-1003, 44 Stat. 9 (26 U. S. C. A. §§ 1225, 1226, and § 1224 and note).

The Colonial Ice Corporation, a New York corporation, had authorized capital stock of $750,000 divided into 6,500 preferred shares at $100 par value and 20,000 common shares at $5 par value. It owned an ice plant and entered into extensive contracts for the alteration and improvement of its buildings and machinery. It became financially involved, and a creditors' committee took charge and formed a new corporation, the petitioner, with a capitalization of $700,000 consisting of 6,000 shares of preferred stock at $100 par value and 20,000 common shares at $5

par value. The assets of the old corporation were transferred to the new, and the new corporation issued 3,385 shares of preferred stock to the old corporation, and it returned the stock to the new corporation with directions that the certificate be canceled and the stock be reissued to such persons as the new corporation might direct; 3,385 shares of common stock of the new company were issued to voting trustees who issued a certificate for a like number of shares to the old company, which indorsed and redelivered said certificate of 3,385 shares to the voting trustees with directions to issue trustees' certificates to such persons as the old company might direct. The stockholders of the old company, with the exception of some owning 247 shares of each class of stock, surrendered their stock to the old company and received from the new company, on direction from the old company, share for share of preferred stock and received voting trust certificates of common stock in the new company share for share. The old company retired and canceled the preferred and common stock so surrendered. The owners of 247 shares of preferred and a like number of common stock of the old company did not surrender their stock up to December 31, 1922. The old company's corporate existence continued throughout the years in question, but subsequent to April 13, 1922, it had no assets or income and carried on no business.

During the period from April 14 to December 31, 1922, the petitioner had a net income of $48,763.43, and, during the calendar year 1924, $56,242.55. For the years 1922 and 1923, the petitioner and the old company filed consolidated returns and claimed a net loss of $40,676.52 sustained by the old company in 1921, thus reporting a net loss of $6,624.59 which they sought to carry forward and use as a deduction from the new company's income of 1923. The Commissioner disallowed this loss, but allowed the new company the benefit of the loss sustained by the old company during the period from January 1 to April 13, 1922, but before the Board of Tax Appeals, in his answer, the Commissioner claimed an additional deficiency for this period based upon the claim that the petitioner was not entitled to deduct the loss sustained by the old company during the period from January 1 to April 13, 1922. It was held by the Board that the two companies were not entitled to file consolidated returns and were separate taxpayers.

It refused to allow petitioners the benefit of the net loss sustained by the old company.

The taxing acts recognized the distinction between corporate entities. Dalton v. Bowers, 287 U. S. 404, 53 S. Ct. 205, 77 L. Ed. 389; Burnet v. Commonwealth Improvement Co., 287 U. S. 415, 53 S. Ct. 198, 77 L. Ed. 399; Burnet v. Riggs Natl. Bank, 57 F. (2d) 980 (C. C. A. 4); Athol Mfg. Co. v. Comm'r, 54 F. (2d) 230, 231 (C. C. A. 1); Ins. & Title Guarantee Co. v. Comm'r, 36 F. (2d) 842 (C. C. A. 2). Under the statute, deductions are personal to the taxpayer. Planters' Cotton Oil Co. v. Hopkins, 53 F. (2d) 825 (C. C. A. 5); Busch v. Comm'r, 50 F. (2d) 800 (C. C. A. 5). Moreover, deductions are restricted usually to the taxable year to which they are properly allocated under the accounting method adopted by the taxpayer. In any case, to support the right of deducting a loss, the taxpayer must come within the terms of the statute permitting the loss. Choteau v. Burnet, 283 U. S. 691, 51 S. Ct. 598, 75 L. Ed. 1353; A. Schrader's Son v. United States, 51 F. (2d) 1038 (C. C. A. 2); Heiner v. Colonial Trust Co., 275 U. S. 232, 48 S. Ct. 65, 72 L. Ed. 256. A taxpayer who seeks to charge off a loss suffered in an earlier year must do so by virtue of some statute permitting the deduction, and must bring himself within the terms thereof; otherwise his losses are confined to the current year. Woolford Realty Co. v. Rose, 286 U. S. 319, 52 S. Ct. 568, 76 L. Ed. 1128. Here the appellant seeks to maintain its position by virtue of the Revenue Act of 1921 (42 Stat. 227, 229, 231, 260) section 202, defining nontaxable transactions, section 204, net loss provisions, and section 240, relating to affiliations.

Section 240 permits consolidated returns. When the transactions of exchange of stock were consummated as stated above, there were outstanding in the old company only 247 shares of each class of stock. The holders of those shares owned no stock in the petitioner. The owners of the remaining preferred stock and of the voting trustees' certificates for a like number of shares of common stock of petitioner owned no stock of the old company. The two companies were not entitled to file a consolidated return. Handy & Harman v. Burnet, 284 U. S. 136, 52 S. Ct. 51, 76 L. Ed. 207. Section 240 does not permit such a return.

Subsection (a) of section 204 specifies the formula for determining net loss, and subsection (b) provides that where any taxpayer has sustained a net loss the amount thereof may be carried forward and "deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year. * * *" The statute limits the use of a net loss to the net income of the taxpayer who sustained the loss. Woolford Realty Co. v. Rose, supra; Comm'r v. Ben Ginsburg Co., 54 F. (2d) 238 (C. C. A. 2). The question therefore is whether the petitioner is the same taxpayer as the old company. An assessment against the old company would not have established a lien upon the assets of the new. Hill v. Firemen's Ins. Co. (D. C.) 25 F. (2d) 1007. The petitioner could not prosecute an appeal from the Board of Tax Appeals with respect to the deficiency asserted against its predecessor. Carnation Milk Products v. Comm'r, 15 B. T. A. 556. In the absence of an exempting statute, the exchange of assets of the old company for the stock of the new company constituted a taxable transaction. Ins. & Title Guarantee Co. v. Comm'r, 36 F. (2d) 842 (C. C. A. 2). Indeed, if the old company were the same taxpayer as the new, only one return should have been filed for the years 1922 and 1923, irrespective of the provisions of § 240. Sweets Co. of America v. Comm'r, 40 F. (2d) 436 (C. C. A. 2).

The petitioner is not the same taxpayer as the old company, and section 202 does not entitle it to deduct the old company's net losses. We are referred to Comm'r v. Sansome, 60 F. (2d) 931 (C. C. A. 2), in pressing the argument that section 202 so operates as to blend the old company into the petitioner and make it a continuation of the old company, but that case is distinguishable on its facts. Unless the petitioner brought itself within the provisions of section 202, it has no application. Ins. & Title Guarantee Co. v. Comm'r, 36 F. (2d) 842 (C. C. A. 2). That section deals with the gain derived or loss sustained from the sale or other disposition of property. The Sansome decision has no bearing upon section 204, but deals entirely with establishing the relation between sections 201 and 202. Sec-

tion 204 relates solely to the computation and use of "net losses resulting from the operation of any trade or business regularly carried on by the taxpayer. * * *" The petitioner and the old company were separate entities and separate taxpayers.

The petitioner is unable to point to any statute allowing it to benefit by the net loss sustained by the old company, and therefore it may not prevail. Woolford Realty Co. v. Rose, supra; Dalton v. Bowers, supra. Pioneer Pole & Shaft Co. v. Comm'r, 55 F. (2d) 861 (C. C. A. 6), and H. H. Miller Industries Co. v. Comm'r, 61 F. (2d) 412 (C. C. A. 6), are cases in which the court held that the petitioner there was the same taxpayer as its predecessor. If they may be regarded as in conflict with this decision, we are constrained not to follow these authorities. We hold the old and the new corporation to be separate taxpayers.

Order affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 24th day of July, one thousand nine hundred and thirty-three.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Augustus N. Hand, Circuit Judges.

NEW COLONIAL ICE CO., INC., Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, affirmed.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. New Colonial Ice Co. vs. Commissioner of Internal Revenue. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 24, 1933. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 83, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of New Colonial Ice Co., Inc., petitioner, against Commissioner of Internal Revenue, respondent, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 19th day of October, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 85] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 4, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,150. U. S. Circuit Court of Appeals, Second Circuit. Term No. 547. New Colonial Ice Company, Inc., Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed October 24, 1933. File No. 547, O. T., 1933.

FILE COPY

FILED
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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 547

NEW COLONIAL ICE CO., INC.,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

EDWARD G. GRIFFIN,
Attorney for Petitioner.

JOSEPH STERLING, ESQ.,
of Counsel.

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Summary of Argument.

POINT I. The question in dispute between the Sixth and Fourth Circuits and the Second Circuit, is whether: Legal Entities should be disregarded in favor of corporate taxpayers so as to permit a successor corporation to avail itself of the net losses of a prior year of its predecessor corporation where the successor corporation is in substance and effect identical with its predecessor?	9
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

NEW COLONIAL ICE CO., INC.,
Petitioner,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SIRS:

PLEASE TAKE NOTICE, that upon the annexed petition of the New Colonial Ice Co., Inc., by Willis B. Kirkpatrick, its President, duly verified the 23rd day of October, 1933, a certified copy of the entire transcript of the record of this proceeding including the proceedings in the Circuit Court of Appeals for the Second Circuit submitted herewith, and the petitioner's brief, also hereto annexed, an application will be made to the Supreme Court of the United States at a Term of said Court appointed to be held at the Capitol, Washington, D. C., on the day of October, 1933, at the opening of Court on that day or as soon thereafter as counsel can be heard for a Writ of Certiorari to be directed to the Circuit Court of Appeals for the Second Circuit, to review the final judgment of the Circuit Court of Appeals for the Second Circuit, entered on the 24th day of July, 1933, which affirmed a judgment of the United States Board of Tax Appeals entered herein on the 8th day of January, 1932.

Dated, October 19th, 1933.

EDWARD G. GRIFFIN,
Attorney for Petitioner,
51 Madison Avenue,
New York City.

JOSEPH STERLING, ESQ.,
of Counsel.

To:

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

NEW COLONIAL ICE CO., INC.,
Petitioner,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, New Colonial Ice Co., Inc., by Willis B. Kirkpatrick, its President, respectfully shows to this Honorable Court as follows:

1. That it is a company duly organized under and by virtue of the laws of the State of New York.

2. The respondent determined a deficiency for the calendar years of 1922 and 1923 against the petitioner herein in the total sum of $5,681.13. Respondent duly sent to the petitioner by registered mail, a notice of its said deficiency. Thereafter, the petitioner filed an appeal from the said notice of deficiency with the United States Board of Tax Appeals. On November 24th, 1931, the Board of Tax Appeals promulgated its findings of

fact and opinion in this appeal and on January 8th, 1932, the Board entered its judgment and final order of redetermination wherein and whereby the Board ordered and decided the amount of deficiencies for the period from April 14th, 1922, to December 31, 1922, at $6,095.43, and for the calendar year of 1923 at $828.07.

3. Petitioner herein and the respondent submitted the issues to the United States Board of Tax Appeals on a stipulated and agreed statement of facts (Rec., fols. 49 to 87). As appears from said stipulated facts, the petitioner was incorporated pursuant to a scheme of reorganization embodied in a written agreement between a predecessor corporation, known as the Colonial Ice Corporation, hereinafter referred to as the "old company" and the creditors of said Colonial Ice Corporation, whereby the petitioner took over the assets and assumed the liabilities of the "old company" and creditors agreed to complete the plant of the "old company", and the stock of the new company was issued in a manner more specifically set forth in said stipulation of facts. The "old company" had substantial losses in the year 1921 and from January 1st to April 13th, 1922.

4. The sole issue involved in this proceeding before the Board of Tax Appeals, was whether the petitioner should have the benefit of the net losses sustained by the "old company" for the calendar year of 1921 and the period of January 1, 1922, to April 13th, 1922. It was the petitioner's contention that whether the petitioner and the "old company" were to be regarded as affiliated under Section 240-c of Revenue Act of 1921, C. 136, 42 Stat. 227, or identical under Section 202-c and 204 of the same Act, the petitioner should receive the benefit of the "old company's" net losses in determining consolidated net income for the period of April 13th, 1922, to December 31, 1922. It was also the peti-

tioner's contention that the separate legal entities of the "old company" and the petitioner should be disregarded, and the petitioner considered as if it were the taxpayer which sustained the prior year's losses. The Board of Tax Appeals held that the separate legal entities should not be disregarded. It found a deficiency against the petitioner and entered its final order redetermining the tax against the petitioner herein.

5. Thereafter, the petitioner appealed to the Circuit Court of Appeals, from the determination of the Board of Tax Appeals, and said appeal came on to be heard before said Court. Thereafter, and on the 24th day of July, 1933, the Circuit Court of Appeals for the Second Circuit entered its mandate affirming the determination of the Board of Tax Appeals.

6. Your petitioner submits that in this case there is no disputed questions of fact. A grave question of law presents itself and one on which there is a irreconcilable conflict between the views of the Circuit Court of Appeals, 6th Circuit and the views of the Circuit Court of Appeals for the 2nd Circuit. The question stated compactly, is this: Where a successor corporation has the same assets and liabilities, with the same stockholders beneficially interested in the same proportions, and with the same classes of stock as its predecessor corporation, and where the succeeding corporation is organized in the same state and with the same corporate purposes as its predecessor, and in all respects, in fact, if not in form, is the same corporation as its predecessor, may the courts overlook the form and deal with the substance to the end that the successor corporation shall be entitled to charge against the profits of one year the losses sustained by the predecessor corporation in the preceding year? To this question, the 6th Circuit has answered in the affirmative, holding that the form shall

be ignored and the substance respected. (*Pioneer Pole & Shaft Co.* v. *Commr.*, 55 Fed. [2] 861; *H. H. Miller Industries* v. *Commr.*, 61 Fed. [2] 412.)

To the same question, the Second Circuit has answered in the negative, declining to follow the rule of the Sixth Circuit (Opinion, page 6).

The view taken by the Second Circuit is, that unless the petitioner is able to point to a specific statute allowing it to benefit by the net loss sustained by its predecessor company, it may not prevail. It refuses to recognize that the corporate fiction may in any case be ignored. On the other hand, the Sixth Circuit, in deciding the *Pioneer Pole* and *H. H. Miller Industries Co.* v. *Commissioner* cases, evidently followed the rule as stated in the Fourth Circuit in *Western Maryland Ry. Co.* v. *Commr.*, 33 Fed. (2) 695, 697 (C. C. A. 4th), in which the learned Court stated:

> "The rule just stated is of peculiar importance in tax cases; for, unless the Courts are very careful to regard substance and not form in matters of taxation, there is grave danger on the one hand that the provisions of the tax laws will be evaded through technicalities and on the other that they will work unreasonable and unnecessary hardship on the taxpayer. It is instructive to note the many tax cases decided in recent years in which the courts have not hesitated to ignore corporate forms, and to decide the questions involved in the light of what the parties have actually done, rather than on the basis of the forms in which they have clothed their transactions."

Your petitioner verily believes, that the learned counsel who represented the respondent herein, also recognized that there was an irreconcilable conflict between

the decision in the instant case and the *Pioneer Pole & Shaft Co.* and *H. H. Miller Industries Co.* v. *Commissioner* cases, *supra.*

Your petitioner submits that no case so far decided has the facts which so squarely raises the proposition of law involved, as the case at bar, and that public interest requires this conflict between the departments to be resolved by this Court.

7. Your petitioner presents herewith, as part of this petition, a brief showing more fully its views upon the questions involved, and a transcript of the record in the Circuit Court of Appeals.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals of the Second Circuit, demanding that court to certify and to send to this Court for its review and determination a full and complete transcript of the record of all proceedings herein and that the said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and that the petitioner may have such other and further relief in the premises as to this Court may seem meet and just.

Dated, New York, October 23rd, 1933.

NEW COLONIAL ICE CO., INC.,
By William B. Kirkpatrick
Petitioner.

Edward G. Griffin
Attorney for Petitioner,
51 Madison Avenue,
New York City.

United States of America,
State of New York,
City of New York,
County of New York, } ss.:

WILLIS B. KIRKPATRICK, being duly sworn, says that he is the President of the New Colonial Ice Co., Inc., the petitioner above named; that he has read the same and knows the contents thereof; and the facts therein stated are true to the best of his knowledge, information and belief.

Willis B. Kirkpatrick

Subscribed and sworn to before me,
this 23rd day of October, 1933.

MARGARET M. DONOVAN,
Notary Public,
Kings Co. Clk's No. 517, Reg. No. 5181,
N. Y. Co. Clk's No. 495, Reg. No. 5D308,
Bronx Co. Clk's No. 31, Reg. No. 95035,
Queens Co. Clk's No. 1832, Reg. No. 7043,
Commission expires March 30th, 1935.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

NEW COLONIAL ICE CO., INC.,
Petitioner,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S POINTS ON APPLICATION FOR WRIT OF CERTIORARI.

Jurisdiction.

The order of the Circuit Court of Appeals affirming the determination of the Board of Tax Appeals was entered on July 24th, 1933. The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code as amended by the Act of February 13th, 1925.

POINT I.

The question in dispute between the Sixth and Fourth Circuits and the Second Circuit, is whether: Legal entities should be disregarded in favor of corporate taxpayers so as to permit a successor corporation to avail itself of the net losses of a prior year of its predecessor corporation where the successor corporation is in substance and effect identical with its predecessor?

H. H. Miller Industries Co. v. *Commr.*, 61 Fed. (2) 931 (C. C. A. 6th);

Pioneer Pole & Shaft Co. v. *Commr.*, 55 Fed. (2) 861 (C. C. A. 6th);
Weiss v. *Stearn*, 265 U. S. 242;
Marr v. *U. S.*, 269 U. S. 536;
Western Maryland Ry. Co. v. *Commr.*, 33 Fed. (2) 695 (C. C. A. 4th);
Industrial Cotton Mills v. *Commr.*, 61 Fed. (2) 291 (C. C. A. 4th);
Standard Silica Co. v. *Commr.*, 22 B. T. A. 97;
Commissioner of Internal Revenue v. *Sansome*, 60 Fed. (2) 931 (C. C. A. 2nd);
Revenue Act of 1921, C. 136, 42 Stat. 227, Secs. 202c, 204 and 240c.

We shall address ourselves to the question as to whether separate corporate identities will be ignored as well in cases when the corporation itself is the taxpayer, as in a case where a stockholder is the taxpayer, on whose behalf it has been urged, that for the purposes of the Act, the stock owner's holdings in the new company was substantially the same thing as his holdings in the old.

Both *Marr* v. *United States, supra,* and *Weiss* v. *Stearn, supra,* recognize that in the latter situation, the separate corporate entities will be treated as one. In the *Standard Silica* case, *supra,* the Board comments on *Weiss* v. *Stearn,* and *Marr* v. *United States.* After discussing these cases, the Board correctly states the principles for which these two cases stand, in the following language:

> "If the foregoing cases just discussed contain any controlling principles relative to the issue here presented, it would seem to be that where two or more corporations reorganize, the business and assets of which are not materially changed and the stockholders receive nothing actually severed from

> their original capital interest,—nothing differing in substance from what they already had, then in such a case the legal distinction in corporate entity should be ignored. See dissenting opinion, *Marr* v. *United States, supra.*"

In both *H. H. Miller Industries Co.* v. *Commr.* and *Pioneer Pole & Shaft Co.* v. *Commr., supra,* the taxpayer was the corporation which sought to invoke the doctrine that corporate fictions were to be ignored not only for the benefit of a stockholder, but for the benefit of the corporation itself. The 6th Circuit adopted this view. It extended the doctrine of *Weiss* v. *Steam, supra,* to the cases then before it.

The view of the 6th Circuit apparently is in harmony with that of the 4th Circuit (see *Western Maryland Ry. Co.* v. *Commr.* and *Industrial Cotton Mills* v. *Commr., supra*). Other cases before the Board of Tax Appeals and various circuits, although deciding adversely to the taxpayer, apparently recognize the rule. Opinions in these cases point out essential differences between the corporate entities, which distinctions are held to be matters of substance and not merely of form. *Standard Silica Co.* v. *Commr., supra,* and *Maytag Co.* v. *Commr.*, 17 B. T. A., 182, are examples.

In the instant case, the identity of New Colonial Ice Co., Inc., the taxpayer, with its predecessor corporation, Colonial Ice Corporation, is so complete that the case may not be disposed of by any real or fancied difference. Factually, there has been no interruption of corporate entity. There are no features in this case which would enable the Court to distinguish it from the *Pioneer Pole & Shaft Co.* v. *Commr.* and *H. H. Miller Industries Co.* v. *Commr.* cases, above discussed. The learned Second Circuit frankly recognizes this in the following language:

> "The petitioner is unable to point to any statute allowing it to benefit by the net loss sustained by the old company and therefore it may not prevail. *Woolford Realty Co.* v. *Rose, supra; Dalton* v. *Bowers, supra; Pioneer Pole & Shaft Co.* v. *Commr.* (55 Fed. [2] 861 [C. C. A. 6]) and *Miller & H. H. Industries Co.* v. *Commr.* (61 Fed. [2] 412 [C. C. A. 6]), are cases in which the court held that the petitioner there was the same taxpayer as its predecessor. If they may be regarded as in conflict with this decision, we are constrained not to follow these authorities. We hold the old and the new corporation to be separate taxpayers."

Counsel for the petitioner also apparently recognizes this to be so in the following language contained in respondent's brief below, counsel stating:

> "To the extent that *Pioneer Pole & Shaft Co.* v. *Commissioner,* and *H. H. Miller Industries Co.* v. *Commissioner, supra,* are in conflict with the position taken by the respondent, we believe those cases to have been incorrectly decided."

The opinion of the learned Court below, is predicated on the premise that a corporate taxpayer may never claim to be the same entity as another corporation. If it is incorrect in this, the reasoning in its opinion fails. If substance is to be considered rather than narrow, literal construction of the statute, we fall under Sections 202(c), 204 and 240(c) of the Revenue Act of 1921, C. 136, 42 Stat. 227. Cases where the Court, at the Government's request, have ignored separate corporate entities and treated two corporations as one, are, *Palmolive Co.* v. *Conway,* 46 Fed. (2) 226; *U. S.* v. *Barwin Realty Co.,* 25 Fed. (2) 1003.

Cases (other than income tax cases), where the corporate fiction has been ignored at the behest of the

corporation itself, are as follows: *Broughton* v. *City of Pensacola*, 93 U. S. 266; *Shapleigh* v. *San Angelo*, 167 U. S. 646; *Alden* v. *Wright*, 175 N. Y. A. D. 692; *Southern Pacific Company* v. *Lowe*, 247 U. S. 330; *First Society of M. E. Church* v. *Brownell*, 5 Hun. 464; *People ex rel. U. S. Grand Lodge* v. *Payn*, 161 N. Y. 229; *People ex rel.* v. *Secretary of State*, 13 N. Y. A. D. 50; *Jones* v. *Frances*, 70 Wash. 676; *McGann* v. *Children's Home Society*, 176 Cal. 359.

It is doubtful whether any case can be found in the books, where the corporate entity has been completely unchanged notwithstanding reincorporation. The issue is therefore clearly raised in this case. We respectfully submit that this Court of final and ultimate jurisdiction should avail itself of the opportunity to establish the law on the subject.

POINT II.

In the interests of unanimity of opinion, a dispute between the Sixth and Second Circuits as to the question presented under Point One should be resolved.

The irreconcilable views expressed by the two circuits, should be resolved by this Court. It is respectfully submitted therefore, that the writ of certiorari prayed for should be granted.

EDWARD G. GRIFFIN,
Attorney for Petitioner,
51 Madison Avenue,
New York City.

JOSEPH STERLING, ESQ.,
of Counsel,
51 Madison Avenue,
New York City.

FILE COPY

FILED
JAN 27 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 547.

NEW COLONIAL ICE CO., INC.,
Petitioner,

against

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER-APPELLANT.

EDWARD G. GRIFFIN,
JOSEPH STERLING,
Attorneys for Petitioner-Appellant.

GALLO & ACKERMAN, Inc., 142 Liberty Street, Telephones—Rector 2-5356-7

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 547.

NEW COLONIAL ICE CO., INC.,

Petitioner,

against

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER-APPELLANT.

Opinions Below.

The opinion of the Board of Tax Appeals is at Record, page 34. The opinion of the Circuit Court of Appeals for the Second Circuit is at Record, pages 43 to 47 inclusive.

Jurisdiction.

This appeal is brought to this Court by petition for a writ of certiorari filed herein on the 24th day of October, 1933, which petition was granted by order of this Court filed herein on December 4th, 1933.

Statutes Involved.

These will be found in the appendix, infra, pages 21-24.

Question Presented.

Where a successor corporation has the same assets and liabilities, the same classes of stock and of the same denominations as the predecessor company, the same amount of stock issued, and held by individuals in the same proportions as these same individuals held stock in the predecessor corporation, shall the separate legal entities be disregarded so as to permit the successor corporation to avail itself of the net losses of the prior year of its predecessor corporation in the manner allowed by Section 204, Subdivision "B", of the Revenue Act of 1921?

Facts.

The agreed statement of facts upon which this case was submitted, indicates that the Colonial Ice Corporation (hereinafter referred to as the "old company") was a New York Corporation, incorporated on April 20th, 1920, with an authorized capital stock of $750,000, consisting of 6,500 shares of preferred stock, of $100.00 par value, and 20,000 shares of common stock, of $5.00 par value (R., 11).

The corporation had been promoted by one Edmond C. Turner, his wife, Florence Turner, and one, Michael De. Carlo. These individuals, through a stock selling campaign, sold the stock among small ice and coal dealers in New York City, in units of one share of common and one share of preferred, at a sales price per unit of $100 (R., 11).

A building site was purchased, extensive contracts were entered into for structural improvements and for

the installation of refrigerating machinery. The largest contract was with the DeLaVergne Machine Company. Said Company and other creditors who installed equipment retained title to the equipment so installed.

A point was reached in August of 1921, when the plant was in a condition to operate at about forty per cent. of its capacity. At that time, it owed creditors approximately $285,000 and was in no financial condition to liquidate this indebtedness (R., 11).

The inability of the Company to meet its indebtedness resulted in the formation of a Creditors' Committee, which Committee thereafter acted through the DeLaVergne Machine Company,—the largest creditor. A Stockholders' Committee was also formed (R., 11, 12).

The investigation disclosed the issuance of spurious stock and stock for which no consideration was received, and of which stock no entries had been made in the records of the Company (R., 12).

This situation brought about the resignation of Mr. Turner, the surrender and cancellation by him and others of stock improperly issued, and the ascertainment by the respective Stockholders' and Creditors' Committees that there were legitimately outstanding 3,385 shares of preferred and a like number of common stock (R., 12).

Negotiations between the creditors and stockholders finally resulted in an agreement between the Old Company (referred to in the agreement as the "Ice Corporation") and the DeLaVergne Machine Company, acting on behalf of itself and other creditors (R., 12).

The agreement recites the indebtedness to the Creditors; the inabilitiy of the Company to pay; the necessity of bringing the plant to full capacity "so that it may operate efficiently, economically and with profit"; that new equipment was required, for which the corporation was without funds; that a "scheme of re-organization" had been proposed, under which the creditors agreed to complete said plant and grant to the Ice Corporation

reasonable time within which to pay its present indebtedness and also the cost of said additional plant, and that the Ice Corporation was desirous of accepting said "scheme of reorganization."

After these recitals, there followed covenants and provisions of the Contract, in substance as follows:

The Ice Corporation agrees that it will cause to be organized under the New York Laws, a new company to be called "New Colonial Ice Co., Inc." Its capitalization was to consist of 6,000 shares of preferred stock of $100 par value and 20,000 shares of common stock at $5.00 par value (R., 15, 16).

The Ice Corporation was to enter into a contract with the New Colonial Ice Co., Inc., and to sell to it all of its assets; the New Company to assume and pay all of the indebtedness of the Old Company; as further consideration for said transfer, the Ice Corporation (the Old Company) was to receive about 3,400 shares of the preferred stock, and voting trust certificates for about 3,400 shares* of common stock of the New Company (R., 16).

In the "Third" paragraph of the agreement, the creditors agreed to complete the plant, at a cost of approximately $132,000, and to extend the time of the payment of both old and new indebtedness for a period of not to exceed five years.

This paragraph contains safeguards to insure that all profits from the operation of the plant shall be used to pay the indebtedness; and until such full payment the creditors shall have control of the management of the Company through the Voting Trust of the common stock; that the creditors were to be represented by four, and the stockholders by three Directors (R., 16, 17).

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*Number of legitimate shares preferred and common of old company later ascertained to be 3,385 of each. Accordingly only these amounts issued (R., 13).

Paragraph "Fourth" provides for the creditors relinquishing management and returning the stock, upon the indebtedness being paid.

A new company was thereupon formed under the laws of the State of New York. Article X of this certificate of incorporation* states as a specific purpose, that it was to "carry on the business of the Colonial Ice Corporation." Also, it was to "assume or otherwise provide for all or any part of the liabilities of said corporation."

Preferred stock in the amount of 3,385 shares (being the identical amount of the legitimate preferred stock outstanding in the Old Company) was issued in one certificate to the Old Company. The certificate was reassigned by the Old Company and re-delivered to the New Company with appropriate directions that it should cancel said certificate and issue and deliver certificates for such preferred stock to such persons, firms, or corporations as the Old Company might direct (R., 13).

A certificate for 3,385 shares of the common stock of the New Company (being the identical amount of the legitimate outstanding common stock of the Old Company) was issued to Louis Baron, Fred Nolte, and Robert D. Eggleston, as Trustees pursuant to said Exhibit "A," annexed to Agreed Statement of Facts (R., 13).

Said voting trustees issued voting trust certificates for 3,385 shares to the Old Company. The Old Company thereupon endorsed and re-delivered said certificate for 3,385 shares to the Voting Trustees, with directions that they should cancel said Certificate and issue Voting Trustees' Certificates to such persons, firms or corporations as the Old Company might thereafter direct (R., 13).

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*The certificate of incorporation of the new company was attached to and formed part of agreed stipulation of facts. It was inadvertently omitted from the printed record. A certified copy of the certificate will be submitted on the argument.

The stockholders of the Old Company, with the exception of stockholders owning 247 shares of each class of stock, surrendered their stock to the Old Company and received from the New Company, as agent for and, on direction from the Old Company, share for share of preferred stock of the New Company, for preferred stock in the Old Company, and received from said voting trustees, on direction of the old company, voting trustees' certificates of common stock in the New Company, share for share, for the common stock so surrendered (R., 13).

The New Company continued to hold the 247 shares of preferred stock, and the Trustees continued to hold 247 shares of voting trust certificates in the New Company available to those stockholders of the Old Company who had not as yet turned in their shares in the Old Company, pursuant to the plan of exchange. Although up to and including December 31, 1922, these 247 shares of each Class of stock were unexchanged, in subsequent years the exchange was effectuated (R., 13, 14).

The Voting Trust Agreement continued until April 9th, 1927, at which date it came to an end, and the common stock was issued to holders of the respective voting trust certificates, and the creditors relinquished their control (R., 14).

In 1921 the Old Company sustained a statutory net loss of $36,093.19.

From January 1st to April 13th, 1922, the Old Company sustained a statutory net loss in the sum of $10,338.90 (R., 14).

For the period from April 14, 1922 up to and including December 31, 1922, the net income of the New Company was the sum of $48,763.43 (R., 14).

For the calendar year of 1923 the net income of the New Company was in the amount of $56,242.55 (R., 14).

On consolidated returns filed by the New Company, there were deducted from its respective net income, the losses so sustained by the Old Company.

The Respondent's notice of deficiency disallows this deduction. These proceedings came before the United States Board of Tax Appeals on a petition for a redetermination of the alleged deficiency. The Board overruled the contentions of the petitioner and found deficiencies in the amounts indicated in the decision (R., 37).

On petition to review, the United States Circuit Court of Appeals, Second Circuit, affirmed the Board of Tax Appeals (R., 43-47).

ARGUMENT.

The petitioner was warranted in deducting from its net income of 1922 and 1923, losses sustained by the Colonial Ice Corporation in 1921 and from January 1st, 1922 to April 13th, 1922. Disregarding the legal fiction, the petitioner was the same taxpayer as its predecessor corporation, Colonial Ice Corporation.

The opinion of the learned Court below, is predicated on the premise that one corporation may never claim to be the same "taxpayer" as another corporation, as the word "taxpayer" is used in Subdivision "B" of Section 204, Revenue Act of 1921. Holding this opinion, the Court below gave no consideration to the factual circumstances which conclusively established that for all practical purposes, the new corporation was the same entity as the old one and therefore the same taxpayer. The Court below expressly declined to follow Pioneer, Pole & Shaft Co. v. Commissioner of Internal Revenue, 55 Fed. (2d) 861 (C. C. A. 6), and H. H. Miller Industries Co. v. Commissioner, 61 Fed. (2d) 412 (C. C. A. 6).*

*Industrial Cotton Mills Co. v. Commissioner, 61 Fed. (2d) 291 (C. C. A. 4) and Western Maryland v. Commissioner, 33 Fed. (2d) (C. C. A. 4) 695, 697, hereinafter discussed, are in accord with the principle recognized by the Sixth Circuit and repudiated by the Second Circuit.

The rule as adopted in the 4th and 6th Circuits, that in applying income tax laws, substance shall prevail over form and distinct corporate entities shall be ignored when in fact, the corporations are one, is in accord with the decisions of this Court.

In Southern Pacific Co. v. Lowe, 247 U. S. 330, the plaintiff in error was taxed as income on dividends declared out of the surplus of the Central Pacific, a corporation of which plaintiff in error owned all of the stock. The surplus out of which the dividends had been declared had been accumulated prior to the effective date of the Income Tax Act of October 3rd, 1913. The payment of the dividend was only constructive, being carried into effect by bookkeeping entries which reduced the surplus of the Central Pacific and reduced apparent indebtedness of the Southern Pacific to the Central Pacific. This Court looked to the actualities, ignored corporate fictions, and permitted recovery of the tax previously paid.

In Gulf Oil Corporation v. Lewellyn, 248 U. S. 71, a transaction was held not to be taxable wherein a holding company took over the earnings and the surplus of its subsidiaries through dividends declared, the dividends being paid by transferring debts due to the subsidiary from another wholly owned subsidiary of the holding company. The result was reached notwithstanding that the court recognized "that the petitioner and its subsidiaries were distinct beings in contemplation of law."*

Weiss v. Stearn, 265 U. S. 242, and Marr v. United States, 268 U. S. 536, are cases where the taxpayer was a stockholder who received substituted securities on the reorganization of a corporation in which he held stock.

*In the Southern Pacific Company case, the Southern Pacific was physically in possession and operated the business of its subsidiary. In the Gulf Oil Corporation case, supra, the opinion states, "The petitioner did not itself do the business of its subsidiaries and have possession of their property as in Southern Pacific Co. v. Lowe, supra, but the principle of that case must be taken to cover this" (p. 73).

In Weiss v. Stearn, supra, upon a reorganization, stockholders received cash for half of their respective holdings, and for the other half, received the same proportionate interest represented by stock, in a new corporation which purchased and took over all of the assets and assumed all of the liabilities of the old company.

The collector had ruled that each stockholder sold his entire holding, and assessed respondent accordingly for the resulting profits. This Court held that the transaction merely amounted to a financial reorganization under which each old stockholder disposed of half of his interest and retained half.

In reaching the determination that the stockholder was in effect retaining half of his former interest, this court of necessity ignored the corporate distinction between the old company and the reorganized company.

In Marr v. United States, supra, while the result was adverse to the taxpayer, the prevailing opinion expressly recognizes the principle that where the business enterprises as conducted remain exactly the same and the corporate identity is preserved notwithstanding reorganization, the courts would treat the two corporations as though they had been the same. However, in the Marr case the reorganized company was organized under the laws of a state other than its predecessor. The succeeding corporation had a 6% non-voting preferred stock, whereas its predecessor had 7% voting stock. Its common stock was subject to the priority of $20,000,000 preferred, whereas the predecessor corporation had common stock subject only to $15,000,000 preferred. The court therefore found, as a factual issue, that "the case at bar is not one in which after the distribution, the stockholders have the same proportional interest of the same kind in essentially the same corporation" (p. 542).

This Court likewise took note as an important although perhaps not controlling circumstance, the fact that the two corporations were organized in different states.

In Burnett v. Commonwealth Improvement Co., 287 U. S. 415, an estate contended that for tax purposes, it was identical with a corporation of which it owned all the stock and debentures. While deciding against the taxpayer, this court again recognized that where the facts warranted, the corporate fiction might be ignored. In the opinion, the following language occurs:

> "While unusual cases may require disregard of corporate form, we think the record here fails to disclose any circumstances sufficient to support the petitioner's claim" (p. 419).

Again in Dalton v. Bowers, 287 U. S. 404, where the claim was asserted by stockholders in a corporation that the corporate entity should be ignored and the claimed loss of the corporation should be treated as the loss of the stockholders, the court recognized the principle for which we contend. It held however, that the facts as disclosed by the record were not in harmony with the argument advanced.

Rule Above Discussed, Followed in Circuit Court of Appeals, 4th, 6th and 3rd Circuits.

Industrial Cotton Mills v. Commissioner, 61 Fed. (2d) 291 (C. C. A. 4), also recognizes and applies the principle in a case where the taxpayer claimed the right to deduct from the profits of one year, the losses of its predecessor corporation in a prior year. In its essentials, this case is strikingly like the case at bar. There, the petitioner sought to deduct, in a consolidated return filed on its behalf and on behalf of Blue Buckle Cotton Mills, Inc., losses sustained by the Blue Buckle in 1921. The Blue Buckle, which was organized in 1920, sustained losses in that year of over $500,000. This loss resulted in financial embarrassment; early in 1921, it elected as directors, members of a creditors' committee and placed them in charge of its business. In November, 1921, the Industrial was organized as a holding com-

pany. It took over certain stock of and all claims outstanding against the Blue Buckle and issued its own stock therefor. In June, 1922, the Blue Buckle and Industrial were merged, as a result of which, the holding of stock and the claims against the Blue Buckle were extinguished and the property of the latter was vested in the Industrial.

The Board of Tax Appeals declined to permit the deduction, holding, that by the merger, a distinct corporate entity was created.

In reversing, the Circut Court of Appeals (4th) held, at page 292:

> "We think that the decision of the Board sacrifices substance to form. There was throughout the years in question but one income-producing property and but one group of people who owned and operated it, i. e., the stockholders and creditors of the Blue Buckle, who as a result of the method of financing adopted became stockholders of the Industrial."

In Pioneer Pole and Shaft Co. v. Commissioner, 55 Fed. (2) 861 (C. C. A. 6), a New Jersey company reincorporated in Ohio. The New Jersey company had issued stock for good will on certain appraised valuation. In determining the income and excess profits tax, the Commissioner declined to make allowance for goodwill as an item of invested capital in accordance with the appraisement on the organization of the original company. The Sixth Circuit held that corporate identity may be recognized, notwithstanding the creation of a new corporation "technically a distinct legal entity" to take over the property of the old corporation and that on the facts disclosed there was such corporate identity.

In H. H. Miller Industries Co. v. Commissioner, 61 Fed. (2d) 412 (C. C. A. 6), the 6th Circuit had before it the question whether the petitioner should be allowed a de-

duction for exhaustion of patent as of its March 1st, 1913 value, or whether the allowable deduction should be based upon the cost to the petitioner of the patent when the petitioner took over the assets of a predecessor corporation. The petitioner was an Ohio corporation; it succeeded a New Jersey corporation, took over all the assets, and assumed liabilities; the stock of the New Jersey corporation was exchanged share for share for that of the Ohio corporation. The name and capital structure of the two corporations and the stockholders remained identical.

The ultimate question presented, was whether on the facts before it, the court should disregard the separate corporate entities, and for tax purposes treat the two corporations as though they had been one. The 6th Circuit regarded the Southern Pacific Co. v. Lowe, supra, Gulf Oil Corporation v. Lewellyn, supra, and Weiss v. Stearn, supra, as authorities justifying it in ignoring the form and regarding only the substance. Accordingly, the petitioner's claimed deduction was allowed.

In Phillips v. Lyman H. Howe Films Co., 33 Fed. (2d) 891 (C. C. A. 3), the 3rd Circuit had before it the question whether a succeeding corporation was the same "taxpayer" as its predecessor corporation within the meaning of Section 284 (G) of the Revenue Act of 1926. This section provides for the filing of a waiver by the taxpayer on or before June 15th, 1926 in respect of taxes for the taxable year of 1920 or 1921, and in the event that such waiver be filed, that credits or refunds for said years shall be allowed if the claim therefor is filed within a certain specified time. In the circumstances there disclosed, the court held that there was an unbroken corporate continuity—so much so, that the new corporation might be regarded as the old corporation and as the "taxpayer", authorized to file the waiver.

In Western Maryland Railway Company v. Commissioner, 33 Fed. (2d) 695 (C. C. A. 4) there was involved

the right of a corporation organized on a merger to avail itself of a deduction on account of certain bond discounts to which one of the merged corporations would have been entitled. In this case, which antedated the Industrial Cotton Mills Co. case, the court found factually that the new corporation and the old corporation, were the same. It therefore treated the two corporations as one and declined to recognize the technical legal differences.

While the Board of Tax Appeals may have been overcritical in seizing upon unimportant differences in denying identity of corporate entities, the Board has, none the less, recognized the general rule. Thus, in Standard Silica v. Commissioner, 22 B. T. A. 97, the Board discussed Weiss v. Stearn, supra, and Marr v. United States, supra, and in its opinion, commented upon these two cases in the following language:

> "If the foregoing cases just discussed contain any controlling principles relative to the issue here presented, it would seem to be that where two or more corporations reorganize, the business and assets of which are not materially changed and the stockholders receive nothing actually severed from their original capital interest,—nothing differing in substance from what they already had, then in such a case the legal distinction in corporate entity should be ignored. See dissenting opinion, Marr v. United States (supra)."

In So Far As Recognizing Or Ignoring Separate Corporate Entities, the Same Principles Should Apply In Construing the Word "Taxpayer" As Used In Section 204 (B), As Is Adopted In Applying Other Sections of the Tax Law.

In the instant case the opinion of the 2nd Circuit stresses the argument that "a taxpayer who seeks to charge off a loss suffered in an earlier year, must do so by virtue of some statute permitting the deduction and must bring himself within the terms thereof, otherwise his losses are confined to the current year" (R., 81).

The same argument was stressed by respondent in the brief below, and we apprehend it will be urged here. There can be no quarrel with this statement as a general principle. However, it has no application to the instant case, and it nowise aids the solution of the question involved.

To meet the requirement of the principle stated, we of course, point to Section 204 (b). This brings us back to the main argument as to whether the word "taxpayer" as used in that provision shall receive a liberal and reasonable construction, or whether the word shall be construed literally and the section narrowly. If it be the government's argument that the courts should adopt one formula in determining who is the taxpayer when the question of a taxable gain is involved, and a different formula when the question of deductable loss is to be considered, we think such a position is untenable.

Neither the statute itself, precedent nor reason, supports such a proposition. It would be unreasonable to say that in construing one provision of the tax law, the court shall face actualities, ignore legal fiction, and treat as one, two separate corporate entities when the facts justify it, and in construing another section of the law with the same corporations and the same facts before it,

the court should blind itself to the facts, ignore the actualities and pay heed to what is really a legal fiction.

It will be observed from the facts in the numerous cases where the principle contended for was accepted by this court and was adopted by the Circuit Court of Appeals, the sections of the income tax law under consideration and the ultimate questions involved, were varied.* As far as counsel's investigation disloses, this court has not been required to pass upon the question as to whether it will treat two corporations as one and as constituting the same "taxpayer" under Section 204 (b), where in fact, the corporations were essentially the same unit. We submit that the same reasoning which requires the application of the rule in circumstances appearing in the cases cited, requires its application in the instant case.

The Facts Disclose Identity For All Practical Purposes Between This Petitioner and Its Predecessor.

In none of the cases which counsel have read, has there been preserved so completely, identity between the old and the new, as in the instant case. The new company took over the assets and assumed the liabilities of the old (R., 13). Theretofore outstanding in the old company, were 3,385 shares of preferred and a like number of common stock; the new company issued the same amount of preferred, the same amount of common (R., 13). The old company's preferred stock were in denominations of $100; its common stock in denomina-

*In cases other than income tax cases, courts, both Federal and State, have recognized a claim by a corporation of practical identity with a predecessor corporation where the facts supported such claim. (Shapleigh v. San Angelo, 167 U. S. 646; Alden v. Wright, 175 N. Y. A. D. 692; First Society of M. E. Church v. Brownell, 5 Hun 464; People ex rel. U. S. Grand Lodge v. Payn, 161 N. Y. 229; People ex rel. Consolidated Kansas City Smelting & Refining Co. v. Secretary of State, 13 N. Y. A. D. 50; Jones v. Frances, 70 Wash. 676; McCann v. Children's Home Society, 176 Cal. 359.)

tions of $5.00 (R., 11). Likewise, the preferred and common stock of the new company were of the denominations of $100 and $5 respectively (R., 12).

The same individuals were beneficially interested in the stock, both preferred and common, of the new company, in the very same proportions as they had been in the stock of the old company.* Both corporations were organized under the laws of the State of New York. The old company, from August of 1921, had been managed by "officers and directors of the creditors' choosing" (R., 12). The new company was under the control and management of the creditors through a voting trust agreement of which the DeLaVergne Machine Company (representing the creditors) acted as the voting trustee, and whereby the creditors had the control of the Board of Directors (R., 17). The certificate of incorporation of the new company specifically states as one of its purposes, that it was to "carry on the business of the Colonial Ice Corporation." The agreement between the creditors and the old company, referred to in the agreement as the "ice corporation", refers to the plan as "a scheme of reorganization". The purpose was to "grant to the ice corporation (the old company), reasonable time within which to pay its present indebtedness and also the cost of said additional plant" (R., 15). The surrounding circumstance, as well as the agreement between the old corpo-

*Up to and including December 31, 1922, the 247 shares of each class of stock were unexchanged although in subsequent years the exchanges were effectuated and the stockholding thereby became identical. For all practical purposes and as of December 31, 1922, the stockholdings may be regarded as identical. Stockholders who had neglected to effectuate the exchange, held 247 shares of preferred and common of the old corporation which had no liabilities, and which had as its only asset, the right to call upon the trustee for the 247 shares of preferred and common of the new company upon surrender of the like amount of the preferred and common of the old. The stockholders of the old company, each on his own behalf, had the right to effect the exchange. To all intents and purposes, the equitable ownership which they then had (later converted into legal ownership by an actual exchange), may be considered as proportionate ownership in the new company.

ration and its creditors, disclose that the petitioner was merely a vehicle by which creditors might more conveniently hold in trust, the control and management of the assets of the old company and its operation, to the end that debts due to these creditors might be paid.

The points of difference between the old and new company were so trivial and inconsequential, as to accentuate the fact that fundamentally, the companies were the same. The old company had an authorized capital stock of $750,000; the new company an authorized capital of $700,000, the difference being that the new company had only authorized 6,000 shares of preferred as against the old company's 6,500 shares. Inasmuch as the old company had outstanding only 3,385 shares of preferred, this reduction of authorized capital stock easily could have been effected by the old corporation without essentially changing its corporate structure.

The opinion of the Board of Tax Appeals comments on the fact that the certificate of incorporation of the petitioner was submitted in evidence, not that of the old company, and therefore, the Board was unable to make proper comparison of their likenesses or differences (R., 36). The two certificates were matters of public record. Undoubtedly, the government's representatives would have offered the old certificate in evidence had it deemed a material difference existed. In the absence of evidence to the contrary, we are warranted in assuming that where a new corporation is formed under the laws of the same state, to take over the business of its predecessor, that it has "presumably the same powers as the old" (Marr v. United States, 268 U. S. 538, 541).

The opinion* of the Board of Tax Appeals as a further ground for holding that the new corporation was some-

*In the opinion of the Board of Tax Appeals, there is the statement "the preferred stock and trustees' voting certificates for common stock of the new company which were held available for exchange when the minority saw fit to turn in its stock, were not held by the old company,

(*Footnote continued on next page.*)

thing essentially different from the old, refers to the fact that the old company, in addition to its financial difficulties, found that a large number of shares had been issued without consideration, and that "in this situation, it was important from the point of view of both the creditors and the bona fide stockholders, that the new corporation to which the assets would be transferred, would be something entirely different from the old corporation, spurious stock of which might still be in existence" (R., 35, 36).

Obviously, the motive which actuated the formation of the new corporation and the method which they adopted, created nothing "entirely different." If stocks were genuine, the holders of stock could not be deprived of their rights by reason of the reincorporation. On the other hand, if stocks were spurious, the holders thereof would have had no greater right in the old company than in the new. The change was evidently dictated by legal tidiness; reincorporation was regarded as the easiest way to remedy the slovenly condition in which the stock of the old company had been handled. It made detection of spurious stock more certain. It was merely the adoption of a new uniform; a change in the outer garb, the substance within being unchanged.

(*Footnote continued from previous page.*)

but by the new" (R., 35). Here, the Board indulged in certain constructions of the stipulated facts not justified by the record. Upon the formation of the new company, the 3,385 shares of preferred, and a like amount of common were issued to the old company. The old company thereupon retransferred the preferred stock to the new company and the common stock to the voting trustee with appropriate directions that preferred stock and voting trust certificates should be issued "as the old company might thereafter direct" (R., 13). The old company did not part with title to either of these classes of stock when it re-endorsed them to the new company and the voting trustees, respectively; the re-transfers were acts of convenience merely. The new company and the voting trustee acting as agent for, and under the direction of the old company in the contemplated retirement of stock.

In the cases heretofore cited and discussed, far more substantial differences have been ignored. As for example, where debts have been reduced and capital increased by the conversion of liabilities into stock (Industrial Cotton Mills Co. v. Commissioner, supra). In H. H. Miller Industries Co. v. Commissioner, supra, the fact that the new corporation was formed in one state and the old corporation in another had been regarded as no longer controlling. In the 2nd Circuit, the continuity of corporate entity was held not to be effected by the fact that the new company was permitted to manufacture products in addition to silk—the product to which the charter of the old company had been confined. Commissioner v. Sansome, 60 Fed. (2d) 931.

It is respectfully submitted that the determination of the Circuit Court of Appeals should be reversed and the case remanded with directions for appropriate allowances to the petitioner.

Respectfully submitted,

EDWARD G. GRIFFIN,
Attorney for Petitioner.

JOSEPH STERLING,
of Counsel.

APPENDIX.

REVENUE ACT OF 1921, C. 136, 42 STAT. 227.

SEC. 2. That when used in this Act—

(1) The terms "person" includes partnerships and corporations, as well as individuals;

* * * * *

(9) The term "taxpayer" includes any person, trust or estate subject to a tax imposed by this Act;

* * * * *

SEC. 202. (c) For the purposes of this title, on an exchange of property, real, personal or mixed, for any other such property, no gain or loss shall be recognized unless the property received in exchange has a readily realizable market value; but even if the property received in exchange has a readily realizable market value, no gain or loss shall be recognized—

(1) When any such property held for investment, or for productive use in trade or business (not including stock-in-trade or other property held primarily for sale), is exchanged for property of a like kind or use;

(2) When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization. The word "reorganization," as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another

corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation (however effected); or

(3) When (A) a person transfers any property, real, personal, or mixed, to a corporation, and immediately after the transfer is in control of such corporation, or (B) two or more persons transfer any such property to a corporation, and immediately after the transfer are in control of such corporation, and the amounts of stock, securities, or both, received by such persons are in substantially the same proportion as their interests in the property before such transfer. For the purposes of this paragraph, a person is, or two or more persons are, "in control" of a corporation when owning at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

(d) (1) Where property is exchanged for other property and no gain or loss is recognized under the provisions of subdivision (c), the property received shall, for the purposes of this section, be treated as taking the place of the property exchanged therefor, except as provided in subdivision (e);

(2) Where property is compulsorily or involuntarily converted into cash or its equivalent in the manner described in paragraph (12) of subdivision (a) of section 214 and paragraph (14) of subdivision (a) of section 234, and the taxpayer proceeds in good faith to expend or set aside the proceeds of such conversion in the form and in the manner therein provided, the property acquired shall, for the purpose of this section, be treated as taking the place of a like proportion of the property converted.

* * * * * *

SEC. 204. (a) That as used in this action the term "net loss" means only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer (including losses sustained from the sale or other disposition of real estate, machinery, and other capital assets, used in the conduct of such trade or business); and when so resulting means the excess of the deductions allowed by section 214 or 234, as the case may be, over the sum of the following: (1) The gross income of the taxpayer for the taxable year, (2) the amount by which the interest received free from taxation under this title exceeds so much of the interest paid or accrued within the taxable year on indebtedness as is not permitted to be deducted by paragraph (2) of subdivision (a) of section 214 or by paragraph (2) of subdivision (a) of section 234, (3) the amount by which the deductible losses not sustained in such trade or business exceed the taxable gains or profits not derived from such trade or business, (4) amounts received as dividends and allowed as a deduction under paragraph (6) of subdivision (a) of section 234, and (5) so much of the depletion deduction allowed with respect to any mine, oil or gas well as is based upon discovery value in lieu of cost.

(b) If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * * *

SEC. 240. (c) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests.

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19599—33

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 547

NEW COLONIAL ICE COMPANY, INC., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 63–66) is reported in 24 B.T.A. 886. The opinion of the Circuit Court of Appeals (R. 79–83) is reported in 66 F. (2d) 480.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1933 (R. 84). Petition for a writ of certiorari was filed October 24, 1933. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where a newly organized corporation with capital structure substantially the same as an existing corporation, takes over, in exchange for a portion of its capital stock, all the assets and liabilities of the old corporation, and such capital stock is distributed by the old corporation to its stockholders share for share, should the new corporation be treated as the same taxpayer as the old for the purpose of applying the net loss provisions of Section 204 of the Revenue Act of 1921?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 11–12.

STATEMENT

Prior to 1922, Colonial Ice Corporation, a New York corporation, with an authorized capital of $750,000, divided into 6,500 shares of preferred stock of $100 par value and 20,000 shares of common stock of $5 par value (R. 53), owned an ice plant and had entered into extensive contracts for the alteration and improvement of its buildings and machinery (R. 53–54). A large number of shares of its stock had been issued without consideration and without any record having been kept showing the parties to whom such stock had been

issued (R. 54). It became financially involved (R. 54), and during 1922 a Creditors' Committee took charge (R. 54) and formed a new corporation, the petitioner, with a capitalization the same as the old except that the new corporation had 500 less preferred shares (R. 60). The old corporation procured the surrender and cancelation of all recorded stock certificates which had been improperly issued, leaving outstanding 3,385 shares of preferred and the same number of shares of common stock which had been legally issued and recorded (R. 55). The assets and liabilities of the old corporation were transferred to the new (R. 60) and the new corporation issued 3,385 shares of its preferred stock to the old corporation, which corporation thereupon assigned and redelivered the certificate back to the new corporation with direction that the certificate be canceled and the stock reissued to such persons as the old corporation might direct (R. 60). Three thousand, three hundred and eighty-five shares of common stock of the new corporation were issued to Voting Trustees, who issued a certificate for a like number of shares to the old corporation, which corporation assigned and redelivered said certificate to the Voting Trustees, with directions to issue Voting Trustees' certificates to such persons as the old corporation might direct (R. 60–61). The stockholders of the old corporation, with the exception of some owning 247 shares of each class of stock, surrendered their stock in the old corporation and

received preferred stock and voting-trust certificates of common stock in the new corporation, share for share. The old corporation retired and canceled the preferred and common stock so surrendered (R. 61). The owners of the 247 shares of preferred and a like number of common stock of the old corporation had not surrendered the stock up to December 31, 1922 (R. 61–62).

During the period from April 14 to December 31, 1922, petitioner had a net income of $48,763.43 (R. 63), and during the calendar year 1923 it had a net income of $56,242.55 (R. 63). For the years 1922 (R. 34) and 1923 (R. 42) petitioner and the old corporation filed consolidated returns. In the 1922 consolidated return they reported a net income of $34,051.93 and claimed a deduction for net loss of $40,676.52 alleged to have been sustained by the old corporation in 1921,[1] thus reporting a net loss of $6,624.59 (R. 34), which they sought to carry forward and use as a deduction from the new corporation's net income in 1923 (R. 34).

The Commissioner of Internal Revenue disallowed the deduction for the loss sustained by the old corporation in 1921 (R. 32), but appears to have allowed the new corporation the benefit of the loss sustained by the old corporation for the period January 1 to April 13, 1922[2] (R. 16). Petitioner ap-

[1] The actual net loss of the old company for that year was $36,093.19 (R. 62–63).

[2] It is agreed that for that period the old corporation sustained a loss of $10,338.90. (R. 63.)

pealed from the Commissioner's determination to the Board of Tax Appeals (R. 3–12), contending that the Commissioner erred in refusing to allow it the benefit of the net loss sustained by the old corporation in 1921 (R. 4). In his answer the Commissioner claimed an additional deficiency for the period April 14 to December 31, 1922, on the ground that petitioner was not entitled to deduct the loss sustained by the old corporation during the period January 1 to April 13, 1922 (R. 16).

The Board of Tax Appeals held that the two corporations were not entitled to file a consolidated return (R. 63–65) and that the two corporations were separate taxpayers (R. 65–66). Accordingly, it refused to allow petitioner the benefit of the net losses sustained by the old corporation. (R. 66.) This holding was sustained by the Circuit Court of Appeals. (R. 81–83.)

Petitioner seeks to bring to this Court the question whether the two corporations were separate taxpayers in such a sense as to preclude the new corporation from having the benefit of the old corporation's net losses (Pet., p. 5).

DISCUSSION

Subsection (a) of Section 204, *infra,* prescribes the formula for determining net losses, and subsection (b) provides that where "any taxpayer has sustained a net loss" the amount thereof may be carried forward and—

> * * * deducted from the net income of *the taxpayer* for the succeeding taxable year;

> and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; * * *. (Italics ours.)

It will be observed that the statute specifically limits the use of a "net loss" to the "net income of the taxpayer" who sustained such net loss. *Woolford Realty Co.* v. *Rose,* 286 U.S. 319, 328–329; *Commissioner* v. *Ben Ginsburg Co.,* 54 F. (2d) 238, 239 (C.C.A. 2d). Thus the question here presented is whether the petitioner is the same taxpayer as the old corporation.

While the decision of the Circuit Court of Appeals holding that it is not, is in accordance with well-established principles of law (*Burnet* v. *Commonwealth Improvement Co.,* 287 U.S. 415, 419–420; *Dalton* v. *Bowers,* 287 U.S. 404, 410; *Athol Mfg. Co.* v. *Commissioner,* 54 F. (2d) 230, 231 (C.C.A. 1st); *Swedish Iron & Steel Corp.* v. *Edwards,* 1 F. Supp. 335, 338 (S.D. N.Y.); *Insurance & Title Guarantee Co.* v. *Commissioner,* 36 F. (2d) 842 (C.C.A. 2d), certiorari denied, 281 U.S. 748; *Burnet* v. *Riggs Nat. Bank,* 57 F. (2d) 980, 983 (C.C.A. 4th)), it seems to be in conflict with the decisions of the Circuit Court of Appeals for the Sixth Circuit in *Pioneer Pole & Shaft Co.* v. *Commissioner,* 55 F. (2d) 861, and *H. H. Miller Industries Co.* v. *Commissioner,* 61 F. (2d) 412, and with the decision of the Circuit Court of Ap-

peals for the Third Circuit in *Phillips* v. *Lyman H. Howe Flms Co.*, 33 F. (2d) 891.

In *Pioneer Pole & Shaft Co.* v. *Commissioner*, the petitioner was organized as a New Jersey corporation in 1902. Thereafter it took over the business and assets of 14 companies and issued corporate stock in exchange for "goodwill." In 1911 an Ohio corporation by the same name was organized and took over all of the assets and assumed all of the liabilities of the New Jersey corporation. There was no change in the capital structure or respective stockholders' interests. In determining the company's income tax for the fiscal year ended July 31, 1919, the Commissioner refused any allowance for goodwill as an item of invested capital. Before the Board of Tax Appeals, the value of the goodwill as of 1902 was established, but there was no proof that stock was issued for goodwill in 1911, or of the value of goodwill received by the Ohio corporation. The Circuit Court of Appeals held that there was substantial identity between the two corporations and that that was all that was necessary to make the two corporations one for the purpose of applying Sections 311 and 326 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1090, 1092, relating to "invested capital."

If the successor corporation in that case was properly regarded as the same corporation as its predecessor for the purpose of applying the invested capital provisions of the Revenue Act of

1918, we hesitate to contend that the decision is not authority for the proposition that petitioner herein is the same corporation as its predecessor for the purpose of applying the net loss provisions of Section 204, *supra*.

In *H. H. Miller Industries Company* v. *Commissioner, supra,* an Ohio corporation was organized as the successor to a New Jersey corporation. All the assets of the New Jersey corporation were transferred to the Ohio corporation and the latter's shares exchanged for those of the former, share for share. The name and capital structure of the two corporations were identical. The stockholders remained the same. Among the assets transferred by the old corporation to the new was a patent for an ice-cream freezer which had been issued to the old corporation in 1910. In its return for 1921 the new corporation claimed as a deduction an amount representing exhaustion of the patent measured by its March 1, 1913, value, instead of the cost to the new corporation. In holding that the March 1, 1913, value governed, the Circuit Court of Appeals said (p. 413), "Where reorganization involves no change in capital structure, the new corporation is considered substantially a continuation of the old." Thus this decision is similar to the *Pioneer Pole & Shaft Co.* decision, *supra.*

In *Phillips* v. *Lyman H. Howe Films Co., supra,* the Lyman H. Howe Attractions Company and the Lyman H. Howe Films Company were incorporated in 1914. On August 26, 1921, the Lyman H.

Howe Attractions Company filed its income-tax return for the fiscal year ended June 30, 1921, which return disclosed no tax liability. On August 26, 1921, the Lyman H. Howe Films Company filed its income-tax return for the same period, disclosing a tax liability of $4,066.10. Upon audit of this return the Commissioner determined an overpayment of $4,066.10. On February 7, 1922, both companies were merged into a new company with the name Lyman H. Howe Films Company. On March 29, 1926, the new company filed a waiver for and on behalf of the original Lyman H. Howe Films Company, purporting to extend the time during which additional assessments for the fiscal year ended June 30, 1921, could be made. The question presented was whether such waiver was filed by the "taxpayer" within the meaning of Section 284 (g) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 67, which provides in part:

> If the *taxpayer* has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. * * * (Italics ours.)

The old company did not owe any tax for which the new company became liable, so that the new company might be called "the taxpayer," as held by

this Court in *United States* v. *Updike*, 281 U.S. 489, 494. Consequently it would seem that if the distinction between corporate entities is to be preserved the new company could in no sense be called "the taxpayer." But if the two companies were properly treated as the same "taxpayer" within the meaning of Section 284 (g), *supra*, it is difficult to see any reason why the two corporations here involved should not be treated as the same "taxpayer" for the purpose of applying the provisions of Section 204 of the Revenue Act of 1921.

In the court below we did not attempt to distinguish these cases,[3] but contented ourselves with saying that we believed them to have been incorrectly decided.

The question presented is one that is constantly recurring in the courts, and therefore it may not be said that the question is not of importance. In view of this fact and of the apparent conflict between the decision in the instant case and the decisions referred to above, we do not oppose the granting of the petition.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
SEWALL KEY,
JOHN H. MCEVERS,
Special Assistants to the Attorney General.

NOVEMBER 1933.

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[3] *Phillips* v. *Lyman H. Howe Films Co.*, *supra*, was not cited.

APPENDIX

The Revenue Act of 1921, c. 136, 42 Stat. 227, 231, provides in part:

> SEC. 2. That when used in this Act—
>
> (1) The term "person" includes partnerships and corporations, as well as individuals:
>
> * * * * *
>
> (9) The term "taxpayer" includes any person, trust or estate subject to a tax imposed by this Act;
>
> * * * * *
>
> SEC. 204. (a) That as used in this section the term "net loss" means only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer (including losses sustained from the sale or other disposition of real estate, machinery, and other capital assets, used in the conduct of such trade or business); and when so resulting means the excess of the deductions allowed by section 214 or 234, as the case may be, over the sum of the following: (1) the gross income of the taxpayer for the taxable year, (2) the amount by which the interest received free from taxation under this title exceeds so much of the interest paid or accrued within the taxable year on indebtedness as is not permitted to be deducted by paragraph (2) of subdivision (a) of section 214 or by paragraph (2) of subdivision (a) of section 234, (3) the amount by which the deductible losses

not sustained in such trade or business exceed the taxable gains or profits not derived from such trade or business, (4) amounts received as dividends and allowed as a deduction under paragraph (6) of subdivision (a) of section 234, and (5) so much of the depletion deduction allowed with respect to any mine, oil or gas well as is based upon discovery value in lieu of cost.

(b) If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 547

NEW COLONIAL ICE COMPANY, INC., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 34–36) is reported in 24 B.T.A. 886. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 43–47) is reported in 66 F. (2d) 480.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1933 (R. 47–48). The petition for a writ of certiorari was filed October 24,

1933, and the writ was granted December 4, 1933 (R. 49). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where a newly organized corporation with capital structure substantially the same as an existing corporation takes over, in exchange for a portion of its capital stock, all the assets and liabilities of the old corporation, and such capital stock is distributed by the old corporation to its stockholders share for share, should the new corporation be treated as the same taxpayer as the old for the purpose of applying the net loss provisions of Section 204 of the Revenue Act of 1921?

STATUTE INVOLVED

The statute involved is set forth in the Appendix, *infra*, pp. 22–23.

STATEMENT

The findings of fact made by the Board of Tax Appeals (R. 27–34), in accordance with the stipulation of the parties (R. 11–21), may be summarized as follows:

Prior to 1922, Colonial Ice Corporation, a New York corporation with authorized capital of $750,000 divided into 6,500 shares of preferred stock of $100 par value and 20,000 shares of common stock of $5 par value, purchased some buildings in New York City and, to convert the same into an ice plant,

entered into extensive contracts for alterations and improvements and for installation of refrigerating machinery (R. 27–28). By August, 1921, the plant was ready for operation at about 40 percent of the entire capacity contemplated, but the company then owed its creditors approximately $285,000 and was not able to pay the same or to secure the additional equipment necessary to operate at a profit (R. 28). There was then formed a Creditors' Committee, as well as a Stockholders' Committee, and upon investigation it was discovered that a large number of shares of stock in the company had been issued without consideration and without any record having been kept showing the parties to whom such stock had been issued (R. 28). The company obtained the surrender of such of the improperly issued stock as it was able to discover and cancelled the same. There then remained 3,385 shares of preferred and 3,385 shares of common stock outstanding which had been legally issued and recorded (R. 28–29).

In August, 1921, the stockholders elected new officers and directors, chosen by the creditors, and in April, 1922, the principal creditor, acting for all creditors, entered into an agreement with the company providing for the completion of the plant and for extension of the time for payment of the indebtedness (R. 29). The company agreed to organize a new corporation, to which it would transfer all its assets in consideration of the assumption of its

indebtedness and the issuance to it of stock in the new corporation (R. 29–30). The creditors agreed to complete the plant and extend the time for payment for five years, the control of the corporation to be vested in the principal creditor under a voting trust agreement until such date as the indebtedness should be paid or the principal creditor should feel justified in surrendering control (R. 30–31). The agreement was not to become binding on the principal creditor until paid in subscriptions for the stock had been received in the amount of $100,000, unless such condition were waived (R. 30).

Pursuant to the agreement New Colonial Ice Company, Incorporated, the petitioner, was organized under the laws of New York with capital of $700,000, divided into 6,000 shares of preferred stock, par value $100 a share, and 20,000 shares of common stock, par value $5 a share, and all the assets and liabilities of the old company were transferred to and assumed by the new company (R. 32). There being 3,385 shares of common and a like number of shares of preferred stock of the old company outstanding at the time of the reorganization, the same number of shares of both common and preferred stock of the new company was issued (R. 32). The new preferred stock was issued to the old company and by it redelivered to the new company with instructions to transfer the same to nominees of the old company (R. 32). The new common stock was issued to three individ-

uals as voting trustees, pursuant to the agreement of April 1922 (R. 32). The trustees issued voting trustees' certificates for the 3,385 shares of new common stock to the old company, which endorsed and redelivered the certificates to the trustees with instructions to transfer the same to the nominees of the old company (R. 32–33). Thereafter the stockholders of the old company, with the exception of the holders of 247 shares of each class of stock, surrendered their old stock and received in lieu thereof, share for share, new preferred stock and voting trustees' certificates for new common stock, and the old stock was thereupon cancelled (R. 33). At the end of 1922 the owners of 247 shares of preferred and common stock of the old company had not exchanged them for new preferred stock and voting trustees' certificates, an equal number of each being held by the new company and the trustees available for such owners of old stock (R. 33). Some time after 1922 the owners of this old stock did exchange the same for a like amount of new preferred stock and voting trustees' certificates (R. 33).

The voting trust created under the agreement of April, 1922, was terminated on April 9, 1927, and the common stock of the new company was then exchanged for the voting trustees' certificates held by the stockholders (R. 33). Upon termination of the voting trust the creditors relinquished control and management (R. 33). The old company

continued in existence throughout 1922 and 1923, but transacted no business and had no assets (R. 33).

The old company sustained statutory net losses of $36,093.19 for the calendar year 1921 and $10,338.90 for the period January 1 to April 13, 1922 (R. 34). The net income of the new company was $48,763.43 for the period April 14, 1922, to December 31, 1922, and $56,242.55 for the calendar year 1923 (R. 34).

For the years 1922 (R. 22A) and 1923 (R. 24A) the petitioner and the old corporation filed consolidated returns. In the 1922 consolidated return they reported a net income of $34,051.93 and claimed a deduction for net loss of $40,676.52 alleged to have been sustained by the old corporation in 1921,[1] thus reporting a net loss of $6,624.59 (R. 22A), which they sought to carry forward and use as a deduction from the new corporation's net income in 1923 (R. 24A).

The Commissioner of Internal Revenue disallowed the deduction for the loss sustained by the old corporation in 1921 (R. 21), but appears to have allowed the new corporation the benefit of the loss sustained by the old corporation for the period January 1 to April 13, 1922[2] (R. 10). The petitioner appealed from the Commissioner's deter-

[1] The actual net loss of the old company for that year was $36,093.19 (R. 34).

[2] It is agreed that for that period the old corporation sustained a loss of $10,338.90 (R. 34).

mination to the Board of Tax Appeals (R. 2–8), contending that the Commissioner erred in refusing to allow it the benefit of the net loss sustained by the old corporation in 1921 (R. 3). In his answer the Commissioner asserted an additional deficiency for the period April 14 to December 31, 1922, on the ground that the petitioner was not entitled to deduct the loss sustained by the old corporation during the period January 1 to April 13, 1922 (R. 10).

The Board of Tax Appeals held that the two corporations were not entitled to file a consolidated return and that the two corporations were separate taxpayers. Accordingly, it refused to allow the petitioner the benefit of the net losses sustained by the old corporation (R. 34–36). The decision of the Board was affirmed by the Circuit Court of Appeals (R. 43–47).

SUMMARY OF ARGUMENT

A taxpayer is entitled only to those deductions expressly authorized by statute, and such deductions are personal to the taxpayer. Ordinarily, the authorized deduction for losses may be taken only in the year in which the losses are sustained. Section 204 of the statute introduced into the revenue laws an exception to the general principle that taxable income must be computed on the basis of annual accounting periods, by permitting the deduction of a net loss sustained in one year from the net income of the two succeeding years. This

privilege, however, is granted only to the taxpayer who sustained the loss and no other taxpayer may take advantage of it.

The petitioner is a separate corporation and distinct entity from the Colonial Ice Corporation, the company which suffered the net losses in question, even though it was organized to take over the business of that corporation, and its stock was distributed to that company's stockholders share for share. Under the statute each corporation was a potential taxpayer. This difference between the corporate entities will not be disregarded in respect of tax matters unless the circumstances are so unusual as to require that the two entities be treated as one. We submit that no decision of this Court furnishes a precedent for the deduction sought here, while decisions of the lower Federal courts and the Board of Tax Appeals, with a few possible exceptions, support the decision below.

We contend that there is no sufficient reason here for treating the two corporations as one continuing entity. There were in fact differences between them, though such differences may have been relatively unimportant. As the Board of Tax Appeals observed (R. 35) "one of the very apparent purposes of the formation of the new corporation was to create a corporation which was separate and distinct from the old corporation." No injustice will result from a strict application

of the provisions of the statute, unless it be that the petitioner's tax will be increased. That fact, we submit, is insufficient.

ARGUMENT

The petitioner asserts the right to deduct from its net income during the period April 14 to December 31, 1922, and the calendar year 1923, the net losses sustained by the Colonial Ice Corporation in 1921 and from January 1 to April 13, 1922. In the court below the petitioner advanced two arguments in support of its position: first, that it was affiliated with the Colonial Ice Corporation during the taxable years in question and was therefore entitled to avail itself of the net losses suffered by that corporation in prior years; and second, that without regard to affiliation the two corporations were in reality one continuing entity and should be treated as a single taxpayer in applying the net loss provisions of the revenue laws. While the petitioner's brief fails to specify the errors intended to be urged, as required by Rule 27, it is apparent that the first contention has been abandoned [3] and that the sole issue now before the Court is whether in the particular circumstances the fact that the petitioner and its predecessor were separate corpo-

[3] Both the Board of Tax Appeals and the court below held that the two corporations were not affiliated. Moreover, affiliation alone would not justify allowance of the deduction. *Woolford Realty Co.* v. *Rose*, 286 U.S. 319; *Planters Cotton Oil Co.* v. *Hopkins*, 286 U.S. 332.

rate entities may be disregarded for the purpose of affording the relief sought.

In computing taxable income only such deductions may be taken as are specifically authorized by the applicable statute. *Brown* v. *Helvering,* decided January 15, 1934, No. 187, October Term, 1933; *Burnet* v. *Thompson Oil & Gas Co.,* 283 U.S. 301, 304. Ordinarily, losses may be deducted only in the year in which they are sustained (*Woolford Realty Co.* v. *Rose,* 286 U.S. 319), and the right of deduction is available only to the taxpayer who suffered the loss. *Busch* v. *Commissioner,* 50 F. (2d) 800, 802 (C.C.A. 5th). See *Anderson* v. *Wilson,* 289 U.S. 20.

Section 204 of the Revenue Act of 1921 (*infra,* p. 22) introduced into the revenue laws a limited exception to the requirement that taxes be computed on the gains and losses of annual accounting periods by permitting taxpayers to carry over the net losses of one year into the two succeeding years. It will be observed, however, that the privilege granted is in terms that of deducting such losses "from the net income of the taxpayer" in the succeeding years, and that the statute does not sanction the application of those losses to reduce the income of any taxpayer other than the one by whom they were sustained. "The statutory net loss deduction has been definitely decided to be a deduction purely personal to the individual taxpayer sustaining it." *Planters Cotton Oil Co.*

v. *Hopkins*, 53 F. (2d) 825, 826 (C.C.A. 5th), affirmed, 286 U.S. 332.

Manifestly the petitioner is not the taxpayer which suffered the losses now sought to be deducted. It was created on April 13, 1922, whereas the losses occurred prior to that date at a time when the petitioner was not in existence. When the petitioner was organized, it became an individual legal entity separate and distinct from the Colonial Ice Corporation, its predecessor. Each corporation was in law a person, having its own existence independent of the other. And under the Revenue Act each corporation was a potential taxpayer.[4]

The petitioner contends, however, that because it was incorporated in the same State as the Colonial Ice Corporation, with the same classes of stock and the same stockholders, for the purpose of carrying on the same business, the technical difference between the two corporations may be disregarded and the petitioner may be treated as the same taxpayer as its predecessor within the meaning of Section 204. Numerous authorities are cited as supporting this proposition, but the majority of them, we submit, are not in point.

While in tax matters, as well as in other types of cases, the courts will sometimes treat two corporations as one, or a corporation as identical with

[4] Section 2 of the Revenue Act of 1921 (*infra*, p. 22) defines the term "taxpayer" as including any person, trust, or estate subject to the tax imposed, and the word "person" includes partnerships and corporations as well as individuals.

its sole stockholder, only exceptional circumstances will be held to justify such disregard of the corporate entity. *Burnet* v. *Commonwealth Improvement Co.*, 287 U.S. 415, 419–420. Generally speaking, two corporations, no matter how intimately they may be related, will be treated as separate taxpayers for all purposes, and this Court has on several occasions given warning that decisions departing from this general principle may not be regarded as precedents in cases in which the circumstances are not substantially the same. *Southern Pacific Co.* v. *Lowe*, 247 U.S. 330, 338; *Lynch* v. *Hornby*, 247 U.S. 339, 346; *Burnet* v. *Commonwealth Improvement Co.*, *supra*, p. 420.

Southern Pacific Co. v. *Lowe*, 247 U.S. 330, *supra*, and *Gulf Oil Corp.* v. *Lewellyn*, 248 U.S. 71, which the petitioner cites, "cannot be regarded as laying down any general rule authorizing disregard of corporate entity in respect of taxation." *Burnet* v. *Commonwealth Improvement Co.*, *supra*, p. 420. Those cases involved the taxability of dividends paid by corporations to other corporations owning all of their capital stock, and the decisions turned wholly on the peculiar facts under consideration (see *Southern Pacific Co.* v. *Lowe*, *supra*, p. 338), which were, we submit, so dissimilar to those involved here as to deprive the cases of any value as precedents in the instant case.

Weiss v. *Stearn*, 265 U.S. 242, and *Marr* v. *United States*, 268 U.S. 536, involved the question

whether taxable income, or gain severed from capital, was realized by a stockholder exchanging stock held in one corporation for a like amount of stock in a new company created in pursuance of a plan of reorganization. The Court directed its attention in each case to the specific question whether the stockholder received by virtue of the exchange anything substantially different from what he originally had. It is apparent that the considerations upon which the decisions turned are far removed from those involved here.

The decision below is in accord with the great majority of the decisions in respect of the right of one corporation to take advantage of net losses sustained by another to whose assets and business it has succeeded. *Athol Manufacturing Co.* v. *Commissioner,* 54 F. (2d) 230 (C.C.A. 1st); *Swedish Iron & Steel Corp.* v. *Edwards,* 1 F. Supp. 335 (S.D.N.Y.); *Clark Dredging Co.* v. *Commissioner,* 23 B.T.A. 503, affirmed on other grounds, 63 F. (2d) 527 (C.C.A. 5th); *Elliott-Granite Linen Co.* v. *Commissioner,* 26 B.T.A. 936; *Hartford Empire Co.* v. *Commissioner,* 26 B.T.A. 134; *Plumber's Supply Co.* v. *Commissioner,* 20 B.T.A. 459; *West Point Marion Coal Co.* v. *Commissioner,* 19 B.T.A. 945. See also *Manufacturers' Trust Co.* v. *Commissioner,* 28 B.T.A. 1259; *Overbrook National Bank of Philadelphia* v. *Commissioner,* 23 B.T.A. 1390; *Standard Silica Co.* v. *Commissioner,* 22 B.T.A. 97; *Maytag Co.* v. *Commissioner,* 17 B.T.A.

182; *Donner* v. *Commissioner,* 16 B.T.A. 758; *Appeal of White House Milk Co.,* 2 B.T.A. 860.

Industrial Cotton Mills v. *Commissioner,* 61 F. (2d) 291 (C.C.A. 4th), cited by the petitioner, is, we submit, distinguishable on its facts although the reasoning of the court tends to support the petitioner's contentions. There it was held that a corporation might deduct a net loss sustained by another corporation which had merged with it. The court stated, however, that the merger alone was not sufficient to justify disregard of the corporate entity. The controlling fact upon which the decision turned was that the taxpayer, prior to the merger, had been nothing but a holding company owning all the stock of the merging corporation, and had derived all its income from the latter.

There are likewise grounds for distinguishing *Pioneer Pole & Shaft Co.* v. *Commissioner,* 55 F. (2d) 861 (C.C.A. 6th); *H. H. Miller Industries Co.* v. *Commissioner,* 61 F. (2d) 412 (C.C.A. 6th); and *Phillips* v. *Lyman H. Howe Films Co.,* 33 F. (2d) 891 (C.C.A. 3d). Nevertheless, as we stated in our memorandum answering the petition for certiorari, we hesitate to contend that there is less justification for treating the corporations as one continuing entity in the instant case than there was in those cases. We believe that the *Pioneer Pole & Shaft Co.* and *H. H. Miller Industries Co.* cases were erroneously decided. In the *Lyman H. Howe Films Co.* case, we submit, the conclusion reached by the court was correct in view of the fact that the

taxpayer was in the position of a transferee, regardless of whether it could properly be treated as a mere continuation of its predecessors.

Western Maryland Railway Co. v. *Commissioner,* 33 F. (2d) 695 (C.C.A. 4th) and *Commissioner* v. *Sansome,* 60 F. (2d) 931 (C.C.A. 2d), are, we submit, plainly distinguishable. In the former, as the court itself observed, the taxpayer fell heir to all the obligations of the corporation with which it was merged and was, therefore, wholly regardless of any question of the identity of the two corporations, entitled to amortize the discount on the bonds of such corporation for which it had assumed liability. In the *Sansome* case the Circuit Court of Appeals for the Second Circuit held that earnings and profits of a corporation taken over by a new company upon reorganization retained the character of earnings and profits for purposes of distribution to stockholders under Section 201 of the Revenue Act of 1921, and did not become capital assets which upon distribution could be used to reduce or amortize the cost of the stockholders' investment. In order to reach this result the court construed Section 201 in conjunction with Section 202, which provides for cases of corporate reorganization resulting in neither gain nor loss to the participating shareholders, and expressly disavowed any intention of relying on cases dealing with the continuity of corporate existence in general, which it characterized (p. 933) as "decisions

, certiorari denied, 287 U.S. 667,

made in analogous, though not parallel, situations." Here, as the same court pointed out (R. 46), we are concerned solely with the application of Section 204, and there is no such intimate relation between that section and Section 202 as to warrant their being construed together.

"Analogous, though not parallel," cases lend support to the decision below. Thus, it has been held that a corporation organized to take over the business of a partnership, all of the stock being owned by the partners, may not compute on the basis of "discovery value" the depletion of an oil well which was "discovered" by the partners (*Darby-Lynde Co.* v. *Commissioner*, 51 F. (2d) 32 (C.C.A. 10th)); that in the absence of an exempting statute the exchange of assets of one company for all the capital stock of another constitutes a taxable transaction (*Insurance & Title Guarantee Co.* v. *Commissioner*, 36 F. (2d) 842 (C.C.A. 2d), certiorari denied, 281 U.S. 748; see *Burnet* v. *Riggs National Bank*, 57 F. (2d) 980, 983 (C.C.A. 4th)); that an assessment against one company does not *ipso facto* establish a lien upon the assets of its successor (*Hill* v. *Firemen's Insurance Co.*, 25 F. (2d) 1007 (W.D. Ark.)); and that prior to the enactment of Section 280 of the Revenue Act of 1926 a corporation could not prosecute an appeal to the Board of Tax Appeals in respect of a deficiency asserted against its predecessor (*Carnation Milk Products Co.* v. *Commissioner*, 15 B.T.A. 556, 559). See also *Dalton* v.

Bowers, 287 U.S. 404; *Burnet* v. *Clark,* 287 U.S. 410; *Marr* v. *United States,* 268 U.S. 536; *McDonald* v. *Commissioner,* 52 F. (2d) 920 (C.C.A. 4th); *Nixon* v. *Lucas,* 42 F. (2d) 833 (C.C.A. 2d); *Commissioner* v. *Van Camp Packing Co.,* 67 F. (2d) 596 (C.C.A. 7th).

It would be futile to attempt to harmonize the above decisions with those to which the petitioner has referred. Each case of this type turns not only upon its peculiar facts but to a large extent upon the purpose for which continuity of corporate life is sought to be recognized. We cannot agree with the petitioner (Br., p. 14) that the courts may not "adopt one formula in determining who is the taxpayer when the question of a taxable gain is involved, and a different formula when the question of deductible loss is to be considered." It seems obvious that wholly different considerations may be involved in the two situations. For instance, in determining whether there is a taxable gain the courts must bear in mind the constitutional limitations upon the power of Congress in respect of income taxation (see *Marr* v. *United States,* 268 U.S. 536, *supra,* p. 539), whereas the allowance of a loss is solely a matter of statutory interpretation. *Burnet* v. *Thompson Oil & Gas Co.,* 283 U.S. 301, 304, *supra.*

We submit that no reason is here apparent for treating the petitioner as anything other than it actually is, namely, a separate legal entity and a

distinct taxpayer. The fact that the petitioner was formed for the purpose of taking over, and did take over, the assets and business of the Colonial Ice Corporation does not make the two corporations identical. Indeed, there were differences between them which, though perhaps of relatively little importance, evidenced the change that had taken place. Thus, the petitioner was capitalized with $50,000 less preferred stock than its predecessor, and the stockholders were temporarily deprived of a valuable right through the creation of a voting trust. True, these changes might have been effected without the creation of a new corporation, but that makes no difference. See *Volker* v. *Crooks,* 53 F. (2d) 886, 887 (W.D. Mo.). The identity of the stockholders was "but a temporary condition, subject to change at any moment at the option of any individual," and the very fact of the transfer of the assets from the old company to the new "evidenced the actual separateness of the two companies." *United States* v. *Phellis,* 257 U.S. 156, 174. As the Board of Tax Appeals aptly observed (R. 35):

> The mere fact that the new corporation was incorporated under the laws of the same state as the old corporation does not necessarily mean that each corporation has the same rights, franchises, powers, privileges and immunities. In fact, one of the very apparent purposes of the formation of the

> new corporation was to create a corporation which was separate and distinct from the old corporation. * * *

If the petitioner was the same taxpayer as the Colonial Ice Corporation, only one return should have been filed for the years in question, irrespective of the provisions relating to affiliation. *Swedish Iron & Steel Corp.* v. *Edwards,* 1 F.Supp. 335, *supra.*[5] See *Sweets Co. of America* v. *Commissioner,* 40 F. (2d) 436 (C.C.A. 2d). Cf. *American Paper Exports* v. *Bowers,* 54 F. (2d) 508, 509 (C.C.A. 2d).

It has been held that the fact of separate identity will not be ignored except to prevent fraud or manifest injustice. See *Turner & Farber-Love Co.* v. *Helvering* (App.D.C.), unofficially reported in Prentice-Hall Federal Tax Service (1934), par. 517. There is, we submit, no injustice in treating the petitioner for tax purposes as just what it has held itself out to be in all other respects—a new and independent entity. In *Falk Corporation* v. *Commissioner,* 60 F. (2d) 204 (C.C.A. 7th) it was held that a newly organized company might not take a deduction for a state income tax asserted against

[5] In that case the court said (p. 338): "Corporation No. 1 filed a tax return for the period from May 1 to October 10, 1918, and the 'new corporation' * * * filed its return for the period from October 10 to December 31, 1918, thereby clearly indicating its own understanding that it was a different taxpayer from corporation No. 1."

its predecessor and paid by it pursuant to an agreement with such predecessor, whose assets it had acquired in exchange for capital stock. After pointing out that the stockholders in both companies were substantially the same, and the interests identical, and that the new corporation had been formed for the express purpose of taking over and carrying on the business, the court said (p. 207):

> We think it is fair to assume that the benefits anticipated by the creation of that separate entity have been realized, and no facts or special circumstances have been presented from which the court can fairly say that a manifest injustice will be done by continuing to regard the two corporations as separate entities, unless it be the fact that petitioner's income tax will thereby be increased. This fact we deem insufficient.

We submit that the petitioner is unable to point to any provision of the statute authorizing it to deduct losses sustained in a prior year by a different legal entity. Since the allowance of deductions is a matter of legislative grace and the burden is upon the taxpayer to show that the statute sanctions the deduction claimed (*Woolford Realty Co.* v. *Rose,* 286 U.S. 319, 326, *supra*), it would seem to be clear that the petitioner is not entitled to the relief which it seeks.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

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FEBRUARY 1934.

APPENDIX

The Revenue Act of 1921, c. 136, 42 Stat. 227, 231, provides in part:

SEC. 2. That when used in this Act—

(1) The term "person" includes partnerships and corporations, as well as individuals;

* * * * *

(9) The term "taxpayer" includes any person, trust or estate subject to a tax imposed by this Act;

(U.S.C., Title 26, Sec. 1262.)

* * * * *

SEC. 204. (a) That as used in this section the term "net loss" means only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer (including losses sustained from the sale or other disposition of real estate, machinery, and other capital assets, used in the conduct of such trade or business); and when so resulting means the excess of the deductions allowed by section 214 or 234, as the case may be, over the sum of the following: (1) the gross income of the taxpayer for the taxable year, (2) the amount by which the interest received free from taxation under this title exceeds so much of the interest paid or accrued within the taxable year on indebtedness as is not permitted to be deducted by paragraph (2) of subdivision (a) of section

214 or by paragraph (2) of subdivision (a) of section 234, (3) the amount by which the deductible losses not sustained in such trade or business exceed the taxable gains or profits not derived from such trade or business, (4) amounts received as dividends and allowed as a deduction under paragraph (6) of subdivision (a) of section 234, and (5) so much of the depletion deduction allowed with respect to any mine, oil or gas well as is based upon discovery value in lieu of cost.

(b) If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

No. 547.—October Term, 1933.

New Colonial Ice Company, Inc., Petitioner, *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	Certiorari to the Circuit Court of Appeals for the Second Circuit.

[May 28, 1934.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a controversy respecting deficiencies in the petitioner's income taxes for 1922 and 1923.

The question presented is—where all the assets and business of an older corporation are taken over by a new corporation, specially organized for the purpose and having substantially the same capital structure, in exchange for a portion of its stock, which is distributed by the older corporation among the latter's stockholders share for share, thereby retiring the old shares, is the new corporation entitled, notwithstanding the change in corporate identity and ownership, to have its taxable income for the succeeding period computed and determined by deducting from its net income for that period the net losses sustained by the older corporation in the preceding period? The answer involves a construction of § 204 (b) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 231, which declares:

"If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary."

The material facts out of which the controversy arises are as follows:

Both corporations were organized under the laws of New York for the purpose of producing and selling ice—the older in 1920, with an authorized capital of $750,000, and the new on April 13, 1922, with an authorized capital of $700,000. The older one had proceeded to issue and sell stock, acquire a site for its plant and supply necessary equipment. When the equipment was only partly installed, and the plant was being operated at forty per cent of its intended capacity, the company became financially embarrassed and unable to meet its indebtedness or supply additional equipment needed to render the business profitable.

A creditors' committee was organized, and likewise a stockholders' committee. Investigation disclosed that much stock had been issued of which there was no record and for which no consideration was received. Negotiations resulted in the restoration and cancellation of the spurious stock and in an agreement to organize a new company to take over the assets and liabilities, proceed with the completion of the equipment and continue the operation of the business. The agreement included provisions for the issue of stock by the new company to the old equal in class, par value and number of shares, to the outstanding stock so that the old company could make an exchange share for share with its stockholders and thereby retire its outstanding stock; for obtaining new funds with which to complete the equipment; for an extension of time by existing creditors; and for investing creditors with a supervising management through a stock-voting trust until their claims were paid.

Accordingly the new corporation—petitioner here—was organized and took over the assets, liabilities and business of the old corporation on April 13, 1922. Other provisions of the agreement were carried out in the manner contemplated, save in minor particulars not material here. The corporate existence of the old corporation continued (so it is stipulated) during the remainder of 1922 and all of 1923, but after the transfer it transacted no business and had no assets or income.

The old corporation sustained statutory net losses in the sum of $36,093.19 during 1921 and in the further sum of $10,338.90 during the part of 1922 preceding the transfer. The new corporation realized a net income of $48,763.43 during the part of 1922 succeeding the transfer and of $56,242.55 during the year 1923. In this proceeding the new corporation asserts a right under § 204 (b)

to a deduction from its income so realized of the losses so sustained by the old corporation.

The petitioner insists that the continuity of the business was not broken by the transfer from the old company to the new; and this may be conceded. But it should be observed that this continuity was accomplished by deliberate elimination of the old company and substitution of the new one. Besides, the matter of importance here, as will be shown presently, is not continuity of business alone but of ownership and tax liability as well. Had the transfer from one company to the other been effected by an unconditional sale for cash there would have been continuity of business, but not of ownership or tax liability.

Petitioner also insists that the ultimate parties in interest—stockholders and creditors—were substantially the same after the transfer as before; and this may be conceded. But there is here no effort to tax either creditors or stockholders. Other statutes, as also constitutional provisions, have an important bearing on the taxation of gains by stockholders through corporate reorganizations, and the cited decisions relating to that subject[1] are not presently apposite. What is being taxed in this instance is the income realized by the new company in conducting the business after the transfer; and the sole matter for decision is whether, under § 204 (b), there shall be deducted from that income the losses suffered by the old company in its conduct of the same business before the transfer.

The Board of Tax Appeals, 24 B. T. A. 886, and the Circuit Court of Appeals, 66 Fed. (2d) 480, both ruled that the deduction is not admissible under the statute.

The power to tax income like that of the new corporation is plain and extends to the gross income. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.

The statutes pertaining to the determination of taxable income have proceeded generally on the principle that there shall be a computation of gains and losses on the basis of a distinct account-

[1]United States *v.* Phellis, 257 U. S. 156; Rockefeller *v.* United States, 257 U. S. 176; Cullinan *v.* Walker, 262 U. S. 134; Weiss *v.* Stearn, 265 U. S. 242; Marr *v.* United States, 268 U. S. 536.

ing for each taxable year; and only in exceptional situations, clearly defined, has there been provision for an allowance for losses suffered in an earlier year. Not only so, but the statutes have disclosed a general purpose to confine allowable losses to the taxpayer sustaining them, i. e., to treat them as personal to him and not transferable to or usable by another.

Obviously, therefore, a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms.

These views, often reflected in decisions of this Court, have been recently reaffirmed and applied in *Woolford Realty Company* v. *Rose*, 286 U. S. 319, 326 *et seq.*; *Planters Oil Company* v. *Hopkins*, 286 U. S. 332; and *Helvering* v. *Independent Life Insurance Company* (decided May 21, 1934).

When § 204 (b) is read with the general policy of the statutes in mind, as it should be, we think it cannot be regarded as giving any support to the deduction here claimed. It brings into the statutes an exceptional provision declaring that where for one year "any taxpayer has sustained a net loss" the same shall be deducted from the net income of "the taxpayer" for the succeeding taxable year; and, if such loss be in excess of the income for that year, the excess shall be deducted from the net income for the next succeeding taxable year. Its words are plain and free from ambiguity. Taken according to their natural import they mean that the taxpayer who sustained the loss is the one to whom the deduction shall be allowed. Had there been a purpose to depart from the general policy in that regard, and to make the right to the deduction transferable or available to others than the taxpayer who sustained the loss, it is but reasonable to believe that purpose would have been clearly expressed. And, as the section contains nothing which even approaches such an expression, it must be taken as not intended to make such a departure.

We come then to an alternative contention that, even though the section be not as broad as claimed, the deduction should be allowed, because "for all practical purposes the new corporation was the same entity as the old one, and therefore the same taxpayer". This is not in accord with the view on which the stockholders and creditors proceeded when the new company was brought into being. They deserted the old company and turned

to the new one because they regarded it as a distinct corporate entity and therefore free from difficulties attending the old one. Having sought and reaped the advantages incident to the change, it well may be that they would encounter some embarrassment in now objecting to an incidental and remote disadvantage such as is here in question. But, be this as it may, we are of opinion that in law and in fact the two corporations were not identical but distinct. This was plainly implied in the transfer of the assets and business from one to the other. That transaction was voluntary and contractual, not by operation of law. Thereafter neither corporation had any control over the other;[2] the old corporation had no interest in the assets or business, and the chance of gain and the risk of loss were wholly with the new one. Thus the contention that the two corporations were practically the same entity and therefore the same taxpayer has no basis, unless, as the petitioner insists, the fact that the stockholders of the two corporations were substantially the same constitutes such a basis.

As a general rule a corporation and its stockholders are deemed separate entities[3] and this is true in respect of tax problems.[4] Of course, the rule is subject to the qualification that the separate identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights.[5] But in this case we find no such exceptional situation—nothing taking it out of the general rule. On the contrary, we think it a typical case for the application of that rule.

The petitioner relies on *Pioneer Pole & Shaft Company* v. *Commissioner*, 55 Fed. (2d) 861; *Industrial Cotton Mills* v. *Commis-*

[2]See Southern Pacific Co. *v.* Lowe, 247 U. S. 330, 337; Peabody *v.* Eisner, 247 U. S. 347, 349; Gulf Oil Corporation *v.* Lewellyn, 248 U. S. 71.

[3]Pullman Car Co. *v.* Missouri Pacific Co., 115 U. S. 587, 596-597; Donnell *v.* Herring-Hall-Marvin Safe Co., 208 U. S. 267, 273; United States *v.* Delaware etc. Co., 238 U. S. 516, 527-529; Cannon Mfg. Co. *v.* Cudahy Co., 267 U. S. 333; Klein *v.* Board of Supervisors, 282 U. S. 19, 24.

[4]Klein *v.* Board of Supervisors, 282 U. S. 19, 24; Dalton *v.* Bowers, 287 U. S. 404, 410; Burnet *v.* Clark, 287 U. S. 410, 415; Burnet *v.* Commonwealth Improvement Co., 287 U. S. 415, 418-420.

[5]United States *v.* Lehigh Valley R. R. Co., 220 U. S. 257, 272-274; Chicago, Milwaukee & St. Paul Ry. Co. *v.* Minneapolis Civic Assn., 247 U. S. 490, 500-501; Southern Pacific Co. *v.* Lowe, 247 U. S. 330, 337-338; Gulf Oil Corporation *v.* Lewellyn, 248 U. S. 71.

sioner, 61 Fed. (2d) 291; and *H. H. Miller Industries Co.* v. *Commissioner,* 61 Fed. (2d) 412. The decisions in these cases are not wholly in point but contain language giving color to the petitioner's claim, and are to that extent in conflict with other federal decisions, notably *Athol Mfg. Co.* v. *Commissioner,* 54 Fed. (2d) 230; *Turner-Farber-Love Co.* v. *Helvering,* 68 Fed. (2d) 416; and the decision now under review. In so far as they are not in harmony with the views expressed in this opinion they are disapproved.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.